This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

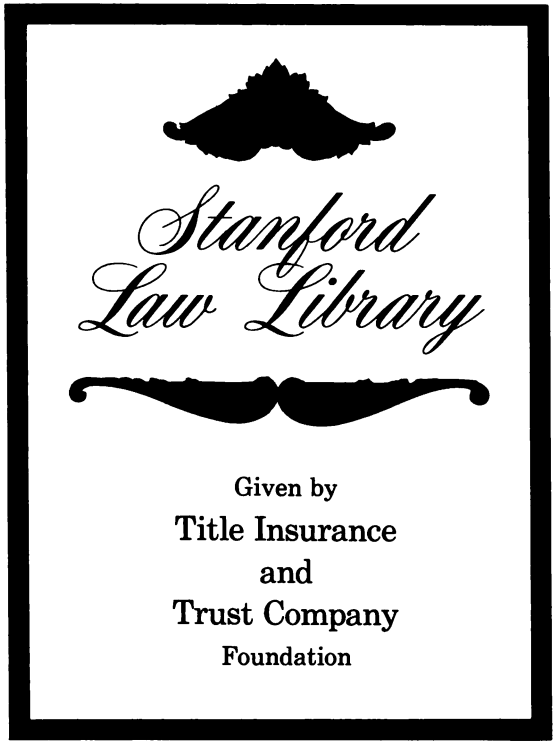
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`


Stanford
Law Library
Given by
Title Insurance
and
Trust Company
Foundation

DL
AFT
UEt

TITLE

TO

REAL AND LEASEHOLD ESTATES

AND

LIENS

BY

ELI FRANK

of the Baltimore Bar

Lecturer on Title to Real Property, Conveyancing and Torts in the University of Maryland.

BALTIMORE,
BALTIMORE CITY PRINTING AND BINDING COMPANY,
EQUITABLE BUILDING.

1912.

PREFACE.

The following pages comprise the notes from which for several years I have lectured to the students of the Law Department of the University of Maryland. I trust that they may prove to be of assistance to the profession. Certain topics, such as the "Torrens System," have been omitted, because not of immediate practical use in this State.

I am indebted to Mr. Karl Singewald for suggestions as to the arrangement of the text.

E. F.

Baltimore, November, 1912.

TABLE OF CONTENTS.

PART I.

TITLE TO REAL AND LEASEHOLD ESTATES.

CHAPTER I.

WHAT IS TITLE? 1

CHAPTER II.

HISTORY OF LAND TITLES IN MARYLAND 3

CHAPTER III.

KINDS OF TITLE 5

CHAPTER IV.

DESCENT 8

CHAPTER V.

DESCENT AT COMMON LAW 12

CHAPTER VI.

MARYLAND LAW OF DESCENTS 16

CHAPTER VII..

TITLE BY ADMINISTRATION 34

CHAPTER VIII.

TITLE BY PURCHASE—PATENTS—COMMON LAW CONVEYANCES. 38

CHAPTER IX.

CONVEYANCES OPERATING UNDER THE STATUTE OF USES.. 49

CHAPTER X.

MODERN CONVEYANCES 56

CHAPTER XI.

MODERN CONVEYANCES—PROPER PARTIES 61

CHAPTER XII.

MODERN CONVEYANCES—CONSIDERATION 70

CHAPTER XIII.

MODERN CONVEYANCES — GRANTING CLAUSE — INTEREST INTENDED TO BE CONVEYED..... 75

CHAPTER XIV.

MODERN CONVEYANCES—DESCRIPTION OF PROPERTY, AND A DESCRIPTION OF THE REAL ESTATE SUFFICIENT TO IDENTIFY THE SAME WITH REASONABLE CERTAINTY.. 83

CHAPTER XV.

MODERN CONVEYANCES—COVENANTS..... 96

CHAPTER XVI.

MODERN CONVEYANCES—EXECUTION 104

CHAPTER XVII.

MODERN CONVEYANCES—ACKNOWLEDGMENT..... 108

CHAPTER XVIII.

MODERN CONVEYANCES—DELIVERY..... 116

CHAPTER XIX.

POWER OF ATTORNEY TO MAKE AND EXECUTE DEED FOR ANOTHER. 122

CHAPTER XX.

RECORDING OR REGISTRATION..... 125

CHAPTER XXI.

TITLE BY DEVISE—SALES BY EXECUTORS OR ADMINISTRATORS 140

CHAPTER XXII.

SALES UNDER EXECUTION..... 144

CHAPTER XXIII.

SALES UNDER DECREE OF A COURT OF CHANCERY..... 148

CHAPTER XXIV.

TAX TITLES..... 152

CHAPTER XXV.

TITLE BY ADVERSE POSSESSION..... 157

CHAPTER XXVI.

TITLE BY PRESCRIPTION FOR INCORPOREAL THINGS..... 172

CHAPTER XXVII.

TITLE BY ESTOPPEL..... 174

CHAPTER XXVII.

TITLE BY ACCRETION..... 181

CHAPTER XXVIII.

TITLE BY ARANDONMENT..... 184

CHAPTER XXIX.

TITLE BY DEDICATION..... 187

CHAPTER XXX.

DISCOVERY, CONQUEST AND TREATY, CONFISCATION AND ESCHEAT, EMINENT DOMAIN..... 206

PART II.

LIENS.

CHAPTER XXXI.

LIENS—VENDOR'S LIENS..... 222

CHAPTER XXXII.

MORTGAGES 229

CHAPTER XXXIII.

MORTGAGES—RIGHTS OF PARTIES..... 239

CHAPTER XXXIV.

MORTGAGES—FORM OF MORTGAGE..... 242

CHAPTER XXXV.

MORTGAGES—ASSIGNMENT OF THE VARIOUS INTERESTS IN THE MORTGAGED PROPERTY..... 255

CHAPTER XXXVI.

MORTGAGES—EQUITABLE MORTGAGES..... 271

CHAPTER XXXVII.

REDEMPTION, SATISFACTION AND PAYMENT OF MORTGAGES. 276

CHAPTER XXXVIII.

OTHER LIENS..... 279

CHAPTER XXXIX.

LIS PENDENS..... 287

CASES CITED

Abell *v.* Brown, 55 Md. 217..... 132
Ahern *v.* White, 39 Md. 409.....254, 281
Alexander *v.* Fidelity & Dep. Co. 108 Md. 541.....141, 260
Alexander *v.* Walter, 8 Gill 239.....175, 178
Allen *v.* Van Bibber, 89 Md. 434..... 161
Allen v. Williams, 89 Md. 434..... 165
Alvey *v.* Hartwig, 106 Md. 254..... 175
Am. Tel. Co. *v.* Pearce, 71 Md. 535.....215, 218
Amey *v.* Cockey, 73 Md. 297.....62, 63, 64
Anderson *v.* Tuck, 33 Md. 225..... 280
Anne Arundel Co. *v.* Watts, 112 Md. 353..... 204
Applegarth *v.* Russell, 25 Md. 317..... 287
Applegarth *v.* Wayne, 86 Md. 468..... 272
Arey *v.* Baer, 112 Md. 541.....165, 170, 180
Armstrong *v.* Bittinger, 47 Md. 103..... 211
Armstrong *v.* Kerens, 61 Md. 364..... 65
Armstrong *v.* Risteau, 5 Md. 256..... 162
Arnsperger *v.* Crawford, 101 Md. 247.....213, 215, 216
Avirett *v.* Barnhart, 86 Md. 545..... 266
Backus *v.* Presbyterian Assn. 77 Md. 50..... 79
Baker *v.* Baker, 108 Md. 269.....240, 287
Baker *v.* Hill, 100 Md. 130..... 240
Baker *v.* Safe Dep. & Tr. Co. 93 Md. 368..... 31
Baker *v.* Swan, 32 Md. 255..... 161
Baldwin *v.* Trimble, 85 Md. 396.....170, 180, 186, 201, 202
Ball *v.* Safe Dep. Co. 92 Md. 503..... 150
Ballantyne *v.* Rusk, 84 Md. 649..... 149
Balto. *v.* B. & P. S. S. Co. 104 Md. 498..... 183
Balto. *v.* Bouldin, 23 Md. 375..... 87
Balto. *v.* Broumel, 86 Md. 153.....189, 201, 202, 203
Balto. *v.* Coates, 85 Md. 531..... 166
Balto. *v.* Fear, 82 Md. 246.....190, 192, 193, 200
Balto. *v.* Frick, 82 Md. 77.....194, 196, 198, 201
Balto. *v.* Hook, 62 Md. 371..... 217
Balto. *v.* Hospital 48 Md. 419..... 183
Balto. *v.* Knell, 111 Md. 583..... 171
Balto. *v.* Peat, 93 Md. 696..... 126
Balto. *v.* R. R. Co. 88 Md. 427.....178, 199
Balto. *v.* Rowe, 107 Md. 704..... 160

Balto. *v.* State, 105 Md. 1 114
Balto. *v.* U. R. & E. Co. 108 Md. 64 150
Balto. *v.* White, 62 Md. 362 200
Balto. Co. Water Co. *v.* Dubreuil, 105 Md. 424 220
Bank *v.* Bank, 91 Md. 613 ..... 271, 272
Bank *v.* Betts, 1 H. & G. 175 58
Bank *v.* Copeland, 18 Md. 305 ..... 114, 266
Bank *v.* Gittings, 45 Md. 181 43
Bank *v.* Gordon, 90 Md. 486 ..... 266, 271
Bank *v.* Hughes, 83 Md. 355 37
Bank *v.* Kearns, 100 Md. 202 74
Bank *v.* Lanahan, 45 Md. 396 ..... 248, 249
Bank *v.* Lindenstruth, 79 Md. 136 253
Bank *v.* Lyles, 12 G. & J. 326 166
Bank *v.* Thomas, 37 Md. 246 175
Barnitz *v.* Reddington, 80 Md. 622 130
Barron *v.* Whiteside, 89 Md. 448 240
Barron *v.* Zimmerman, 117 Md. 296 ..... 22, 29
Barry *v.* Edlavitch, 84 Md. 95 94
Barry *v.* Hoffman, 6 Md. 78 118
Basshor *v.* Stewart, 54 Md. 376 109
Baugher *v.* Merryman, 32 Md. 185 232
Baumeister *v.* Silver, 98 Md. 418 ..... 64, 169, 170, 171
Baumgardner *v.* Fowler, 82 Md. 631 154
Bay *v.* Posner, 78 Md. 42 ..... 68, 93
Bayne *v.* State, 62 Md. 100 116
Beall *v.* Holmes, 6 H. & J. 205 9
Beatty *v.* Mason, 30 Md. 409 159
Bellona Co.'s Case, 3 Bland 442 212
Bembe *v.* Anne Arundel Co. 94 Md. 321 204
Benson *v.* Yellot, 76 Md. 159 151
Benzinger *v.* Gies, 87 Md. 704 155
Bernstein *v.* Hobelman, 70 Md. 29 68
Berry *v.* Derwart, 55 Md. 66 ..... 83, 230
Berry *v.* Skinner, 30 Md. 569 235
Billingsley *v.* Tongue, 9 Md. 575 25
Black *v.* Baltimore, 50 Md. 235 218
Blessing *v.* House, 3 G. & J. 290 83
Bloede *v.* Baltimore, 115 Md. 594 ..... 199, 200
Bond *v.* Baltimore, 116 Md. 683 215
Booth *v.* Baltimore Steam Packet Co., 63 Md. 39 241

Boteler *v.* Brookes, 17 G & J. 143..... 234
Bourke *v.* Boone, 94 Md. 472..... 9
Boyce *v.* Kelbaugh, 47 Md. 334.....179, 189
Boyce *v.* Kelso Home, 107 Md. 190..... 80
Boyd *v.* Parker, 43 Md. 182.....264, 270
Bradbury *v.* Dumond, 80 Ark. 82; 11 L. R. A. N. S. 772..... 161
Bradford *v.* MacKenzie, 89 Md. 763..... 8
Brady *v.* Johnson, 75 Md. 445..... 253
Brick Co. *v.* Amos, 95 Md. 571..... 250
Brooks *v.* Bergner, 83 Md. 352..... 142
Broumel *v.* White, 87 Md. 521..... 191
Brown *v.* Miller, 101 Md. 600..... 272
Brown *v.* Reeder, 108 Md. 653.....51, 52, 92
Brown *v.* Renshaw, 57 Md. 67..... 52
Brown *v.* Shilling, 9 Md. 74..... 211
Brown *v.* Stewart, 56 Md. 421.....260, 277
Browne *v.* Kennedy, 5 H. & J. 195..... 88
Browne *v.* M. E. Church, 37 Md. 108..... 179
Bryan *v.* Harvey, 18 Md. 113..... 94, 138
Bryant *v.* Wilson, 71 Md. 440..... 98
Brydon *v.* Campbell, 40 Md. 331.....107, 108, 132, 133, 246
Budd *v.* Brooke, 3 Gill 198..... 88, 134
Building Asso. *v.* Andrews, 95 Md. 698..... 257
Building Asso. *v.* Brace, 51 Md. 508.....109, 110
Building Asso. *v.* Gross, 71 Md. 456..... 257
Building Asso. *v.* Hamill, 55 Md. 313..... 75
Building Asso. *v.* Lowdermilk, 50 Md. 175..... 236
Building Asso. *v.* Lusby, 116 Md. 173.....109, 115, 135
Building Asso. *v.* Middleton, 112 Md. 10.....231, 276
Building Asso. *v.* Price, 53 Md. 397..... 236
Building Asso. *v.* Robinson, 90 Md. 615.....101, 238
Building Asso. *v.* Wilson, 41 Md. 506.....135, 137
Bull *v.* Beiseker (N. D), 14 L. R. A. N. S. 514..... 103
Burke *v* Baltimore, 77 Md. 469..... 87
Busey *v.* Reese, 38 Md. 264.....129, 246
Butler *v.* Rahm, 46 Md. 541..... 253
Cadwalader *v.* Price, 111 Md. 310.....83, 160, 161, 173
Cain *v.* Miller, 117 Md. 45..... 143
Cal. N. & I. Co. *v.* Transp. Co. 126 Cal. 433; 46 L. R. A. 825.. 189
Callaway *v.* Forest Park Co. 113 Md. 7..... 80, 204
Campbell *v.* Shipley, 41 Md. 81..... 163

Canton Co. v. Baltimore, 104 Md. 582 ..... 173, 203
Canton Co. v. Baltimore, 106 Md. 69,
170, 180, 184, 185, 189, 191, 192, 193, 196, 201, 202, 203, 204
Canton Co. v. R. R. Co. 99 Md. 202 ..... 184, 186
Carey v. Dennis, 13 Md. 1 ..... 120, 121
Carl Lee v. Elisberry, 82 Ark. 209; 12 L. R. A. N. S. 356 80
Carmine v. Bowen, 104 Md. 198 ..... 178, 179
Carr v. Hobbs, 11 Md. 285 ..... 223, 228
Carr v. McColgan, 100 Md. 462 179
Carrico v. Bank, 33 Md. 235 ..... 106, 107, 225, 227, 246
Carroll v. Granite Mfg. Co. 11 Md. 499 93
Carroll v. Manganese Steel Safe Co. 111 Md. 252 178
Carroll v. Maydwell, 3 H. & J. 292 42
Carroll v. Norwood, 5 H. & J. 155 ..... 41, 44, 58, 67
Carroll Springs Dist. Co. v. Schneppe, 111 Md. 420 ..... 178, 179
Carson v. Phelps, 40 Md. 73 ..... 117, 249
Carswell v. Swindell, 102 Md. 636 39
Carter v. Van Bokkelen, 73 Md. 175 277
Carter v. Woolford, 71 Md. 283 ..... 160, 169
Casey v. Inloes, 1 Gill, 430 ..... 27, 210, 211
Castelberg v. Wheeler, 68 Md. 266 74
Catholic Cemetery v. Manning, 72 Md. 120 ..... 79, 80
Charles v. Clagett, 3 Md. 82 248
Chase v. McDonald, 7 H. & J. 160 250
Chelton v. Green, 65 Md. 272 239
Cheney v. Barker (Mass.), 16 L. R. A. N. S. 436 220
Cheney v. Watkins, 1 H. & J. 527 51
Chew v. Bank, 14 Md. 299 61
Chew v. Buchanan, 30 Md. 367 262
Chew v. Tome, 93 Md. 244 6
Chilton v. Brooks, 71 Md. 445 ..... 68, 261
Chilton v. Brooks, 72 Md. 554 ..... 255, 257
Chirac v. Reinecker, 2 Peters, 613 16
Christopher v. Christopher, 64 Md. 583 ..... 71, 72, 225
Cincinnati v. White, 6 Peters, 431 190
Cissel v. Henderson, 88 Md. 574 274
Clark v. Wilson, 27 Md. 693 32
Clarke v. Creswell, 112 Md. 339 ..... 117, 120
Classen v. Chesapeake Co. 81 Md. 258 183
Clendenin v. Md. Cons. Co. 86 Md. 80 ..... 178, 197, 202
Coal Co. v. R. R. Co. 41 Md. 43 102

Cochran *v.* Pascault, 54 Md. 1..... 99, 177
Cockey *v.* Milne, 16 Md. 200.....133, 245
Cohen *v.* Numsen, 104 Md. 676..... 86
Cole *v.* Pennington, 33 Md. 476.....120, 134
Columbia Bag Co. *v.* Carr, 116 Md. 541..... 150
Colvin *v.* Warford, 20 Md. 357..... 104
Combe's Case, 9 Coke, 76b.....123, 124
Condon *v.* Sprigg, 78 Md. 330..... 117
Connaughton *v.* Barnard, 84 Md. 622..... 177
Conner *v.* Waring, 52 Md. 724..... 17
Cooke *v.* Cooke, 43 Md. 522..... 73
Cooke *v.* Councilman, 109 Md. 622..... 84, 165
Cooke *v.* Kell, 13 Md. 469..... 73
Corrie *v.* Thompson, 57 Md. 197..... 66
Cox *v.* Forrest, 60 Md. 74..... 184
Crean *v.* McMahon, 106 Md. 507.....35, 37, 171
Crisfield *v.* Storr, 36 Md. 129..... 97, 100
Culbreth *v.* Smith, 69 Md. 450..... 80
Cumberland *v.* Willison, 50 Md. 138..... 216
Cumberland Coal & Iron Co. *v.* Parrish, 42 Md. 598..... 266
Cunningham *v.* Dwyer, 23 Md. 219..... 70, 71
Cushwa *v.* Williamsport, 117 Md. 306.....170, 180, 188
Dance *v.* Dance, 56 Md. 433..... 223
Davidson *v.* Myers, 24 Md. 538..... 280
Davis *v.* Furlow, 27 Md. 536..... 164
Davis *v.* Hamblin, 51 Md. 525, 539..... 113
Davis *v.* Realty Co. (N. Y.), 20 L. R. A. N. S. 175..... 228
Dawson v. R. R. Co. 107 Md. 70; 14 L. R. A. N. S. 809,
60, 76, 103, 126, 132, 256
Day *v.* Allender, 22 Md. 511..... 172
Day *v.* Davis, 101 Md. 259..... 232
Day *v.* Day, 22 Md. 530..... 39
Dayton *v.* Stewart, 99 Md. 643..... 118
Deakins *v.* Rex, 60 Md. 593..... 146
Dempsey *v.* McNabb, 73 Md. 433..... 35
Demuth *v.* Bank, 85 Md. 315.....261, 264
Dickerson *v.* Church, 105 Md. 638..... 171
Dickey *v.* Bank, 89 Md. 280..... 263
Diggs *v.* Fid. & Dep. Co. 112 Md. 50.....249, 253
Diggs *v.* McCulloh, 69 Md. 592..... 71
Dilley *v.* Love, 61 Md. 603..... 31

Dineen *v.* Corp. Relief of Widows, 114 Md. 589.....91, 187, 189, 195
Dixon *v.* Clayville, 14 Md. 537..... 263
Dize *v.* Beacham, 81 Md. 602..... 138
Dobbins *v.* Dobbins (N. C.), 10 L. R. A. N. S. 185..... 164
Dodge *v.* Dodge, 109 Md. 164..... 15
Donnelly *v.* Hilbert, 9 Md. 570..... 211
Donnelly *v.* Turner, 60 Md. 81..... 6, 26
Dorsey *v.* Hammond, 1 H. & J. 190..... 94
Dowling *v.* Hennings, 20 Md. 179..... 173
Downs *v.* Blount, 31 L. R. A. N. S. 1076..... 115
Dredging Co. *v.* Smoot, 108 Md. 54..... 89
Druid Pk. Heights Co. *v.* Oettinger, 6 Gill, 487..... 15
Dudrow *v.* King, 117 Md. 182.....19, 22, 26
Duer *v.* James, 42 Md. 492..... 116
Duffy *v.* Calvert, 6 Gill, 487..... 15
Dugan *v.* Gittings, 3 Gill, 138.....168, 169
Dulany *v.* U. Rwys. & Elec. Co. 104 Md. 423..... 87, 215
Dungan *v.* Ins Co. 46 Md. 469..... 233
Dunnington *v.* Hubbard, 65 Md. 87.....66, 116, 133
Duval *v.* Becker, 81 Md. 537.....184, 238
Duval *v.* Wilmer, 88 Md. 66..... 137
Duvall *v.* Perkins, 77 Md. 582..... 145
Dyson *v.* Simmons, 48 Md. 207.....145, 271, 274, 281
Eichelberger *v.* Sifford, 27 Md. 320..... 123
Elwood *v.* Lannon, 27 Md. 200.....20, 21, 22
Emrich *v.* Union Stock Yards Co. 86 Md. 482..... 44
Ensor *v.* Lewis, 54 Md. 391..... 235
Erdman *v.* Corse, 87 Md. 506..... 165
Estep *v.* Mackey, 52 Md. 592..... 29
Evans *v.* Brady, 79 Md. 142..... 76
Evans *v.* Bulman, 91 Md. 84..... 277
Evans *v.* Horan, 52 Md. 602.....62, 104, 125
Evans *v.* Merriken, 8 G. & J. 39..... 231
Falck *v.* Barlow, 110 Md. 159..... 126
Farrell *v.* Bean, 10 Md. 223..... 251
Faust *v.* Bldg. Asso. 84 Md. 186..... 245
Feigley *v.* Feigley, 7 Md. 537..... 288
Felgner *v.* Slingluff, 109 Md. 474.....232, 235
Fisher *v.* Parr, 92 Md. 245..... 150
Fisher *v.* Wagner, 109 Md. 243..... 30
Flach *v.* Gottschalk Co. 88 Md. 368..... 61, 62

Fleming *v.* McCurtain, 215 U S. 556; 54 L. Ed. 16..... 77, 78
Flersheim *v.* Baltimore, 85 Md. 489.....195, 198, 199, 201
Fox *v.* Reynolds, 50 Md. 564..... 149
Frank *v.* Auerbach, 72 Md. 580..... 32
Frush *v.* Green, 86 Md. 494..... 66
Fry *v.* Talbott, 106 Md. 43..... 71, 224
Funk *v.* Harshman, 110 Md. 127..... 272
Funk *v.* Newcomer, 10 Md. 301.....177, 179
Furhman *v.* Furhman, 115 Md. 436..... 141
Gantt v. Trott, 107 Md. 325..... 25
Garner *v.* Wood, 71 Md. 37.....21, 25, 26, 28
Garbutt *v.* Mayo, 128 Ga. 269; 13 L. R. A. N. S. 58.....137, 139
Gardiner *v.* Baltimore, 96 Md. 361..... 218
Garrett *v.* R. R. Co. 74 Md. 277..... 217
Garrison *v.* Hill, 81 Md. 206..... 23
Gent *v.* Lynch, 28 Md. 65..... 159
George *v.* Andrews, 60 Md. 26..... 257
Georgetown College *v.* Perkins, 74 Md. 72..... 281
Gibson *v.* McCormick, 10 G. & J. 65..... 255
Gillet *v.* Shaw, 117 Md. 508..... 61, 62
Gilpin *v.* Hollingsworth, 3 Md. 190..... 7
Gittings *v.* Worthington, 67 Md. 139..... 97
Glenn *v.* Baltimore, 67 Md. 390..... 200
Glenn *v.* Canby, 24 Md. 127.....100, 101, 102
Glenn *v.* Davis, 35 Md. 208.....133, 185
Goldberg *v.* Feldman, 108 Md. 330..... 100
Goldberg *v.* Novickow, 113 Md. 29..... 104
Goodman *v.* Wineland, 61 Md. 449..... 72
Goodsell *v.* Lawson, 42 Md. 373..... 183
Goodwin *v.* Keerl, 3 H. & McH. 403..... 12
Goodwin *v.* White, 50 Md. 503..... 72
Gore *v.* Brubaker, 55 Md. 87..... 204
Gorsuch *v.* Rutledge, 70 Md. 272.....116, 121
Gosa *v.* Light Co. (Wis), 15 L. R. A. N. S. 531..... 219
Graf *v.* Baltimore, 10 Md. 544..... 218
Grafflin *v.* State, 103 Md. 171..... 277
Grafton *v.* R. R. Co. (16 N. D.), 22 L. R. A. N. S. 1..... 215
Graham *v.* Whitridge, 99 Md. 248..... 23, 53
Graves *v.* Spedden, 46 Md. 527..... 32
Grebb *v.* Rose, 40 Md. 387..... 64, 65
Green *v.* Bank, 86 Md. 279..... 270

Greenleaf *v.* Bartlett (N. C.), 14 L. R. A. N. S. 660..... 161
Griffith *v.* Dale, 109 Md. 697..... 240
Grove *v.* Todd, 41 Md. 633.....64, 112, 115
Grove *v.* Trustees, 33 Md. 451..... 161
Guisebert *v.* Etchison, 51 Md. 478..... 154
Gulick *v.* Fisher, 92 Md. 353..... 172
Gump *v.* Sibley, 79 Md. 165.....89, 90, 167, 171
Guyer *v.* Smith, 22 Md. 239, 247..... 210
Gwynn *v.* Thomas, 2 G. & J. 420..... 99
Hackett *v.* Webster, 97 Md. 404.....160, 161
Haddaway *v.* Smith, 71 Md. 319..... 65
Hall *v.* Gittings, 2 H. & J. 112..... 208
Hall *v.* Hall, 21 Md. 439..... 63
Hall *v.* Jacobs, 4 H. & J. 245..... 6
Hambleton *v.* R. R. Co. 44 Md. 551..... 178
Hamilton *v.* R. R. Co. 1 Md. 553..... 215
Hamilton *v.* Traber, 78 Md. 26..... 151
Hammond *v.* Ridgely, 5 H. & J. 245..... 85
Handy *v.* McKim, 64 Md. 560.....41, 45, 52, 53, 57, 76
Handy *v.* Waxter, 75 Md. 517..... 149
Hanson *v.* Johnson, 62 Md. 25.....165, 167
Harbor Co. *v.* Smith, 85 Md. 537.....127, 131, 132, 189, 192, 193, 197
Harding *v.* Allen, 70 Md. 295..... 130
Hardy *v.* Bank, 51 Md. 562..... 178
Harper *v.* Hampton, 1 H. & J. 622..... 124
Harrison *v.* Morton, 87 Md. 671..... 243
Harrison *v.* R. R. Co. 58 Md. 490.....248, 249
Hartman *v.* Thompson, 104 Md. 389.....67, 68, 116, 118
Hawbecker *v.* Hawbecker, 43 Md. 516..... 30
Hawkins *v.* Chapman, 36 Md. 83..... 15, 77
Hawkins' Lessee *v.* Gould, 3 H. & J. 243..... 67
Hawley *v.* Baltimore, 33 Md. 270.....195, 198
Hearn *v.* Purnell, 110 Md. 458.....72, 116, 117, 120, 135, 138
Heck *v.* Remka, 47 Md. 68..... 85
Heller *v.* Bank, 89 Md. 602..... 285
Henderson *v.* Baltimore, 8 Md. 352..... 119
Herbold *v.* Bldg. & Loan Assn. 113 Md. 156..... 165
Herold *v.* Real Estate Co. (N. J.), 14 L. R. A. N. S. 1067..... 196
Heuisler *v.* Nickum, 38 Md. 270..... 254
Highberger *v.* Stiffler, 21 Md. 338..... 114
Hill *v.* McConnell, 106 Md. 574.....84, 85, 86, 153, 154

Hill *v.* Williams, 104 Md. 595.....152, 155
Hillers *v.* Taylor, 108 Md. 148..... 30
Hiss *v.* McCabe, 45 Md. 77.....110, 166
Hiss *v.* R. R. Co. 52 Md. 242..... 219
Hoffman *v.* Gosnell, 75 Md. 577.....126, 135, 139
Hoffman *v.* Watson, 109 Md. 532.....14, 19, 20, 24, 26
Hoffsass *v.* Mann, 74 Md. 400..... 75
Hogan *v.* McMahon, 115 Md. 195.....164, 234
Hollander *v.* Cent. Metal & Supply Co. 109 Md. 131.....100, 101
Holzman *v.* Wager, 114 Md. 322..... 34
Homer *v.* Balto. Heat. & Ref. Co. 117 Md. 411.....135, 239
Homer *v.* Grosholz, 35 Md. 520..... 178
Homestead Asso. *v.* Moore, 80 Md. 102..... 225
Hooper *v.* Logan, 23 Md. 201..... 226
Hooper *v.* Trust Co. 81 Md. 559..... 71, 224
Hopper v. Smyser, 90 Md. 363..... 81, 256
Homer *v.* Chaisty, 101 Md. 593..... 101
Hopper *v.* Smyser, 900 Md. 363..... 81, 256
Horner *v.* Chaisty, 101 Md. 593..... 101
Howard *v.* Rogers, 4 H. & J. 278..... 192
Hubbard *v.* Greeley, 84 Me. 340; 17 L. R. A. 511.....120, 121
Huddleson *v.* Reynolds, 8 Gill, 332..... 83
Hughes *v.* Riggs, 84 Md. 502..... 237
Hughes *v.* Wright (Tex.), 11 L. R. A. N. S. 643..... 110
Hunt *v.* Brown, 75 Md. 481.....89, 90, 91
Ins. Co. *v.* Brown, 77 Md. 64..... 234
Ins. Co. *v.* Conowingo Co. 113 Md. 430.....231, 238
Ins. Co. *v.* Doll, 35 Md. 89.....122, 124
Ins. Co. *v.* Ins. Co. 10 Md 517..... 132
Ins. Co. *v.* Kelly, 32 Md. 421..... 238
Ins. & Trust Co. *v.* Rose, 2 Md. Ch. 25..... 262
Israel *v.* Israel, 30 Md. 120..... 164
Jacobs *v.* Disharoon, 113 Md. 92.....162, 164, 165
Jarboe *v.* Hall, 37 Md. 345..... 146
Jeffers *v.* Annapolis, 107 Md. 268..... 219
Johns *v.* Scott, 5 Md. 81..... 133
Johnson *v.* Canby, 29 Md. 211..... 247
Johnson *v.* Hines, 61 Md. 122..... 253
Johnson's Lessee *v.* McIntosh, 8 Wheat. 543; 5 L. Ed. 681..... 3
Jones *v.* Plater, 2 Gill, 125..... 86
Jones *v.* Rose, 96 Md. 483.....176, 177

Jones *v.* Syer, 52 Md. 211..... 92
Jordon *v.* Reynolds, 105 Md. 288.....144, 280
Judik *v.* Crane, 81 Md. 610..... 240
Justis *v.* Justis, 99 Md. 69..... 31
Kane *v.* Baltimore, 15 Md. 240.....214, 215, 218
Keene *v.* Van Reuth, 48 Md. 184..... 175
Kelley *v.* Harper, 64 Md. 74..... 26
Kelly *v.* Hill, 76 Md. X 25 Atl. Rep. 919.....75, 79, 81
Kelly *v.* Rosenstock, 45 Md. 389..... 109
Kelso *v.* Stigar, 75 Md. 376.....171, 176
Kennedy *v.* Cumberland, 65 Md. 514.....202, 203
Key *v.* Davis, 1 Md. 32..... 61
Kiernan *v.* Jersey City (N. J.), 31 L. R. A. 1023..... 191
Kilpatrick *v.* Baltimore, 81 Md. 179..... 80
Kingan Pack. Asso. *v.* Lloyd, 110 Md. 619..... 150
Knell *v.* Build. Asso. 34 Md. 67.....129, 131, 247
Kolb *v.* Herman, 82 Md. 339..... 166
Koogle *v.* Cline, 110 Md. 586.....58, 71, 72
Kopp *v.* Hermann, 82 Md. 339..... 35, 161
Kranz *v.* Baltimore, 64 Md. 491..... 189
Krause *v.* El Paso (Tex.), 14 L. R. A. N. S. 582.....170, 180
Lambert *v.* Morgan, 110 Md. 1..... 131
Latrobe *v.* Carter, 83 Md. 279.....6, 15, 25
Lawson *v.* Mullinix, 104 Md. 156..... 71, 251
Leppoc *v.* Bank, 32 Md. 136.....116, 118
Lester *v.* Hardesty, 29 Md. 50..... 101
Levering *v.* Gosnell, 115 Md. 582..... 148
Levering *v.* Heighe, 2 Md Ch. 81..... 63
Lewis *v.* Kinniard, 104 Md. 653.....84, 93, 163, 176
Link *v.* McNabb, 111 Md. 641.....75, 80, 81, 131
Linthicum *v.* Coan, 64 Md. 439..... 181
Linthicum *v.* Polk, 93 Md. 84..... 34
Lloyd *v.* Burgess, 4 Gill, 187..... 176
Long *v.* Long, 62 Md. 33..... 150
Long *v.* Ragan, 94 Md. 462..... 94
Louisville School Bd. *v.* King (Ky.), 15 L. R. A. N. S. 379.... 209
Lowe *v.* Maccubbin, 1 H. & J. 550..... 28
Lumber Co. *v.* Lumber Co. (N. C.), 21 L. R. A. N. S. 843.... 253
Lurman *v.* Hubner, 75 Md. 268.....161, 162
Lynn *v.* Mt. Savage Co. 34 Md. 603..... 103
McCabe *v.* Brosenne, 107 Md. 490..... 31, 32

McCalla v. Investment Co. (Kan.), 14 L. R. A. N. S. 1255..... 129
McComas *v.* Amos, 29 Md. 132..... 22, 23
McCormick *v.* Baltimore, 45 Md. 512..... 180, 200, 201
McCracken *v.* Ins. Co. 43 Md. 471..... 262, 264
McCutcheon *v.* McCutcheon (S. C.), 12 L. R. A. N. S. 1140.... 162
McDonald *v.* Build. Asso. 60 Md. 589..... 106
McGaw *v.* Gortner, 96 Md. 489..... 284
McGilvra *v.* Ross, 215 U. S. 70..... 181
McKaig *v.* Piatt, 34 Md. 249..... 167
McMahon *v.* Crean, 109 Md. 652..... 152, 153, 154, 155
McMurray *v.* Baltimore, 54 Md. 103..... 204
Madigan *v.* Bldg. Asso. 73 Md. 317..... 115
Mahoney *v.* McCubbin, 54 Md. 268..... 257
Manning *v.* Thurston, 59 Md. 218..... 80
Manton *v.* Hoyt, 43 Md. 254..... 144
Marden *v.* Leimback, 115 Md. 206..... 80, 81
Marshall *v.* Safe Deposit & Trust Co. 101 Md. 1..... 79, 81
Marshall *v.* Whately, 136 Ga. 805; 36 L. R. A. N. S. 552..... 287
Maslin *v.* Marshall, 94 Md. 480..... 236
Matthews *v.* Turner, 64 Md. 100..... 35
Matthews *v.* Ward, 10 G. & J. 443..... 27, 41, 51, 57, 125, 208, 209
Maughlin *v.* Perry, 35 Md. 352..... 101
Maus *v.* McKellip, 38 Md. 231..... 250
Md. Construction Co. *v.* Kuper, 90 Md. 529..... 92
Merryman *v.* Cumberland Paper Co. 98 Md. 223..... 159, 165, 169
Miles *v.* Knott, 12 G. & J. 442..... 146
Milholland *v.* Tiffany, 64 Md. 455..... 244, 267
Miller *v.* Bd. Commissioners, 8 Gill, 128..... 29
Miller *v.* Williamson, 5 Md. 219..... 140
Millikin *v.* Platt, 115 Md. 480..... 287
Mitchell *v.* Mitchell, 2 Gill, 231..... 9
Moale *v.* Baltimore, 5 Md. 314..... 211
Mobberly *v.* Mobberly, 60 Md. 376..... 69
Moore *v.* Rayner, 58 Md. 411..... 86, 172
Morris *v.* U. S. 196; 43 L. Ed. 946..... 4
Moss *v.* Chappell, 126 Ga. 196; 11 L. R. A. N. S. 398..... 95
Mullen *v.* Brydon, 117 Md. 554..... 154
Murguiondo *v.* Hoover, 72 Md. 9..... 288
Murray *v.* Kerney, 115 Md. 514..... 51, 58
Musgrove *v.* R. R. Co. 111 Md. 629..... 245
Myers *v.* Safe Dep. & Tr. Co. 73 Md. 413..... 36

Neal *v.* Hopkins, 87 Md. 19..... 192
Needles *v.* Martin, 33 Md. 600..... 171
Needy *v.* Middlekauf, 102 Md. 181..... 82, 87
Neel *v.* Hughes, 10 G. & J. 8, 10..... 83
Neidig *v.* Whiteford, 29 Md. 178..... 269
New Cent. Co. *v.* George's Creek Co. 37 Md. 537.....214, 215
New Windsor *v.* Stocksdale, 95 Md. 96..... 202
Newbold *v.* Condon, 104 Md. 100..... 92
Newbold *v.* Peabody Heights Co. 70 Md. 493..... 103
Nicholson *v.* Snyder, 97 Md. 415..... 114
Nickle *v.* Brown, 75 Md. 172.....101, 126, 131
Niece *v.* Elaison, 78 Md. 168..... 276
Niles *v.* Cooper, 98 Minn. 39; 13 L. R. A. N. S. 49..... 137
Noakes & Co Ltd. *v.* Rich, A. C. (1902), 24..... 232
Norris *v.* Baltimore, 44 Md. 598..... 218
O'Brien *v.* Clark, 101 Md. 30..... 87
O'Brien *v.* R. R. Co. 74 Md. 363.....216, 217
Oberheim *v.* Reeside, 116 Md. 265..... 204
Ogle *v.* Cumberland, 90 Md. 59..... 203
Ontario Land Co. *v.* Yordy, 212 U. S. 152..... 83
Orrick *v.* Fid. & Dep. Co. 113 Md. 239..... 267
Owens *v.* Milller, 29 Md. 144..... 243
Owings *v.* Norwood, 2 H. & J. 96..... 55
Paca *v.* Forwood, 2 H. & J. 176..... 59
Packard *v.* Ulrich, 106 Md. 246.....148, 151
Pacy *v.* Safe Dep. & Tr. Co. 113 Md. 315..... 140
Pancoast *v.* Addison, 1 H. & J. 350..... 169
Parker *v.* Willis, 60 Md. 19..... 159
Parks *v.* Parks, 19 Md. 323..... 32
Parlett *v.* Clark, 9 Cranch, 292..... 188
Parrott *v.* Bank, 88 Md. 515..... 263
Parsons *v.* Urie, 104 Md. 238; 8 L. R. A. N. S. 559.....220, 269, 270
Peabody Heights Co. *v.* Sadtler, 63 Md. 533..... 90
Peddicord *v.* R. R. Co. 34 Md. 463..... 220
Peoria *v.* Bank, 224 Ill. 43; 12 L. R. A. N. S. 686..... 180
Peter *v.* Prettyman, 62 Md. 566..... 128
Peters *v.* Tilghman, 111 Md. 227..... 159
Pfeaff *v.* Jones, 50 Md 263.....130, 136, 247
Phelps *v.* Phelps, 17 Md. 120..... 84
Philbin *v.* Thurn, 103 Md. 342..... 66
Phillips *v.* Insley, 113 Md. 341.....106, 171

Phipps *v.* R. R. Co. 66 Md. 314..... 215
Pitts *v.* Baltimore, 73 Md. 326.....191, 196, 200
Pleasanton *v.* Johnson, 91 Md. 673..... 244
Polk *v.* Rose, 25 Md. 155..... 152
Polke *v.* Clark, 92 Md. 372..... 138
Poole *v.* R. R. Co. 88 Md. 533..... 218
Port *v.* Carpenter, 19 L. R. A. N. S. 206..... 273
Posey *v.* Budd, 21 Md. 477..... 18
Posner *v.* Bayless, 59 Md. 56.....123, 124
Potomac Co. *v.* Smoot, 108 Md. 54.....132, 178
Potomac Lodge *v.* Miller, D. R. Oct. 8, 1912.....165, 176
Poultney *v.* Emerson, 117 Md. 655..... 177
Poultney *v.* Tiffany, 112 Md. 630..... 26
Powell *v.* Hopkins, 38 Md. 1..... 235
Preston *v.* Evans, 56 Md. 476..... 64
Pritchett *v.* Jackson, 103 Md. 696..... 80
R. R. Co. v. Baltimore, 106 Md. 561.....39, 88, 181, 182, 183
R. R. Co. *v.* Boyd, 63 Md. 325.....213, 217
R. R. Co. *v.* Chase, 43 Md. 23..... 182
R. R. Co. *v.* Cons. Coal Co. 95 Md. 630.....193, 219
R. R. Co. *v.* Corbin, 109 Md. 52..... 282
R. R. Co. *v.* Gantt, 39 Md. 115..... 238
R. R. Co. *v.* Goodwin, 77 Md. 271..... 262
R. R. Co. *v.* Gould, 67 Md. 60..... 90, 191
R. R. Co. *v.* Hanken (Ia.), 19 L. R. A. N. S. 216..... 164
R. R. Co. *v.* Silver, 110 Md. 510.....79, 100, 103
R. R. Co. *v.* Smith, 97 Md. 177..... 88
R. R. Co. *v.* Trimble, 51 Md. 99..... 279
R. R. Co. *v.* Watson, 74 Kan. 494; 14 L. R. A. N. S. 592.... 171
R. R. Co. *v.* Whitman, 155 Ill. 514; 28 L. R. A. 612..... 192
Rawlings *v.* Lowndes, 34 Md. 639..... 119
Rea *v.* Twilley, 35 Md. 409..... 9
Reddall *v.* Bryan, 14 Md. 444..... 213
Reese *v.* Reese, 41 Md. 554..... 176
Reese *v.* Starner, 106 Md. 50..... 29
Regents *v.* Trustees, 104 Md. 635.....67, 126, 161, 171
Register *v.* Register, 104 Md. 1..... 224
Reid *v.* Weissner Brew. Co. 88 Md. 234..... 101
Reimler *v.* Phingster, 78 Md. 14..... 269
Renehan *v.* McAvoy, 116 Md. 356.....116, 117
Ressmyer *v.* Norwood, 117 Md. 320.....244, 245

Rex *v.* Lloyd, 1 Camp. 260..... 194
Reynolds *v.* Ins. Co. 34 Md. 280..... 178
Richards *v.* Owings, 86 Md. 663..... 264
Richardson *v.* Davis, 91 Md. 390.....195, 201
Richardson *v.* R. R. Co. 89 Md. 126.....230, 238
Richardson *v.* Simpson, 82 Md. 155..... 155
Richardson *v.* Smith, 80 Md. 94..... 29
Ridgely *v.* Bond, 18 Md. 433..... 9
Rieman *v.* R. R. Co. 81 Md. 68..... 90, 91
Riley *v.* Carter, 76 Md. 581; 19 L. R. A. 489.....41, 62, 63
Ringgold *v.* Bryan, 3 Md. Ch. 488..... 138
Rizer *v.* Perry, 58 Md. 112..... 10
Roberts *v.* Roberts, 102 Md. 131; L. R. A. N. S. 778..... 84
Robertson *v.* Mowell, 66 Md. 530..... 269
Rogers *v.* Raborg, 2 G. & J. 54..... 85
Rogers *v.* Scharf, 3 Gill, 127..... 138
Rogers *v.* Sisters of Charity, 97 Md. 550.....41, 45, 53, 55, 57
Rosenstock *v.* Keyser, 104 Md. 380..... 272
Rosenthal *v.* Ruffin, 60 Md. 324..... 122
Ross *v.* McGee, 98 Md. 389..... 79, 172
Rother *v.* Sharp St. Station, 85 Md. 528..... 165
Rowe *v.* Gillelan, 112 Md. 108..... 148
Royal Arcanum *v.* Nicholson, 104 Md. 482.....148, 151
Russell *v.* Carman, 114 Md. 25..... 114
Rutter *v.* Small, 68 Md. 133..... 165
St. James *v.* R. R. Co. 114 Md. 442..... 216
Safe Dep. & Tr. Co. *v.* Baker, 91 Md 297..... 31
Safe Dep. & Tr. Co. *v.* Marburg, 110 Md. 410,
158, 161, 163, 165, 166, 170, 171, 176
Sadtler *v.* Peabody Heights Co. 66 Md. 1.....159, 160
Sanders *v.* McDonald, 63 Md. 503.....104, 287
Saylor *v.* Plaine, 31 Md. 158..... 10
Scanlan *v.* Walshe, 81 Md. 118..... 30
Scarlet *v.* Montell, 95 Md. 148..... 93
Scarlett *v.* Robinson, 112 Md. 202.....150, 151, 284
Schaefer *v.* Loan & Land Co. 47 Md. 126..... 237
Schaidt *v.* Blaul, 66 Md. 141..... 68
Schaub *v.* Griffin, 84 Md. 557..... 34
Schlossnagle *v.* Kolb, 97 Md. 285.....162, 164, 166
Schwarz *v.* Stein, 29 Md. 112.....223, 225
Scott *v.* R. R. Co. 93 Md. 475..... 285

Second Universalist Society v. Dugan, 25 Md. 490 88
Sellman v. Sellman, 63 Md. 520 6
Semmes v. Hinson, 24 L. R. A. N. S. 787 ..... 6, 87
Sharp St. Station v. Archer, 63 Md. 289 139
Shanfelder v. Baltimore, 80 Md. 485 17
Sharp St. Station v. Archer, 63 Md. 289 ..... 139, 152
Shipley v. Funk, 102 Md. 222 175
Shipley v. B. R. Co. 39 Md. 115 229
Shively v. Bowlby, 152 U. S. 1; 38 L. Ed. 331 88
Shriver v. State, 65 Md. 278 38
Shugars v. Shugars, 105 Md. 356 7
Shyrock v. Morris, 75 Md. 72 ..... 144, 152
Simpson v. Bailey, 80 Md. 422 143
Sittler v. McComas, 66 Md. 135 ..... 112, 133, 134
Smallwood v. Hamm, 4 Md. Ch. 95 88
Smith v. Heldman, 93 Md. 343 103
Smith v. Maryland, 6 Cranch 286 207
Smith v. Smith, 113 Md. 495 70
Smith v. Wilson, 17 Md. 460 38
Snook v. Munday, 90 Md. 701 ..... 142, 143
Snook v. Zentmyer, 91 Md. 485 270
Snowden v. Crown Cork & Seal Co. 114 Md. 635 97
Sollers v. Sollers, 77 Md. 148 173
Southgate v. Annan, 31 Md. 113 ..... 21, 29
Spencer's Case, 5 Coke, 16 103
Spreckles v. Brown, 212 U. S. 208 ..... 30, 38, 39, 80
Stanhope v. Dodge, 52 Md. 483 ..... 110, 130, 133, 139, 248, 249
Starr v. James, 84 Md. 282 160
State v. Brown, 73 Md. 484 233
State v. Graves, 19 Md. 351 ..... 214, 215
State v. Humbird, 54 Md. 327 105
Sterling v. Park (Ga.), 58 S. E. 828; 13 L. R. A. N. S. 298 97
Stewart v. Collier, 3 H. & J. 289 24
Stewart v. Griffith, 217 U. S. 323 142
Stewart v. Jones, 8 G. & J. 1 ..... 15, 19, 21
Stewart v. May, 111 Md. 162 ..... 85, 152
Stewart v. Pattison, 8 Gill, 46 9
Stewart v. Redditt, 3 Md. 67 118
Stokes v. Detrick, 75 Md. 256 ..... 60, 118, 250, 257
Story v. Ulman, 88 Md. 244 197
Stover v. Steffey, 115 Md. 524 ..... 193, 195, 196, 198

Strother *v.* Calor Oil Co. (Ky.), 11 L. R. A. N. S. 727..... 220
Stuart *v.* Baltimore, 7 Md. 500..... 217
Stuckey *v.* Loan Co. 8 L. R. A. N. S. 814..... 257
Stump *v.* Warfield, 104 Md. 530.....162, 171, 177, 235, 254, 269
Sullivan *v.* Buckner, 107 Md. 33..... 161
Suman *v.* Harvey, 114 Md. 241.....11, 19, 24, 25, 26
Sumwalt *v.* Tucker, 34 Md. 89..... 239
Supply Co. *v.* McColgan, 100 Md. 479.....145, 281
Supreme Council *v.* Nicholson, 104 Md. 472.....148, 151
Susquehanna Trans. Co. *v.* St. Clair, 113 Md. 667..... 216
Swarz *v.* C. & S. Realty Co. 106 Md. 290..... 224
Swartz *v.* Chickering, 58 Md. 290..... 128
Talbert *v.* Mason (Ia.), 14 L. R. A. N. S. 878..... 195
Taylor *v.* Carroll, 89 Md. 32; 44 L. R. A. 479.....235, 236, 278, 289
Taylor *v.* Forrest, 96 Md. 520..... 154
Tel. Co. *v.* Mackenzie, 74 Md. 36..... 220
Tel. Co. *v.* Pearce, 71 Md. 535.....215, 218
Tel. Co. *v.* Ruth, 106 Md. 644; 14 L. R. A. N. S. 358..... 91, 220
Textor *v.* Orr, 86 Md. 392.....272, 274
Textor *v.* Shipley, 86 Md. 424..... 152
Thistle *v.* Coal Co. 10 Md. 129..... 161
Thomas *v.* Ford, 63 Md. 346.....189, 190, 218
Thomas *v.* Owen, 20 Q. B. D. 225..... 95
Thompson *v.* Williams, 100 Md. 105..... 74
Tidewater Canal Co. *v.* Archer, 9 G. & J. 479.....213, 215
Timanus *v.* Dugan, 46 Md. 402..... 78
Timms *v.* Shannon, 19 Md. 296.....231, 239
Tinges *v.* Baltimore, 51 Md. 600.....197, 198
Tome Inst. *v.* Crothers, 89 Md. 569.....182, 183
Tome Inst. *v.* Davis, 89 Md. 591..... 1, 183
Tongue *v.* Nutwell, 17 Md. 212..... 179
Totten *v.* Brady, 54 Md. 170..... 74
Townsend *v.* Boyd, 217 Pa. 386; 12 L. R. A. N. S. 1148..... 163
Townsend *v.* Epstein, 93 Md. 537.....213, 215, 216
Trasher *v.* Everhart, 3 G. & J. 234..... 105
Trayhern *v.* Colburn, 66 Md. 277..... 175
Trimble *v.* King (Ky.), 22 L. R. A. N. S. 881.....184, 186
Trust Co. *v.* Thomas, 105 Md. 507..... 249
Tyler *v.* Abergh, 65 Md. 18..... 128
U. R. & Elec. Co. *v.* Corbin, 109 Md. 52..... 282
Ulman *v.* Charles St. Ave. Co. 83 Md. 130.....170, 201
Union Hall Asso *v.* Morrison, 39 Md. 281..... 179

Valentine *v.* Hagerstown, 86 Md. 486..... 202
Valentine *v.* Seiss, 79 Md. 187.....138, 144, 145, 247
Van Bibber *v.* Reese, 71 Md. 608..... 284
Van Riswick *v.* Goodhue, 50 Md. 57.....105, 245
Van Witsen *v.* Gutman, 79 Md. 405.....189, 213, 215
Vogel *v.* Trunt, 110 Md. 192..... 20
Vogler *v.* Geiss, 51 Md. 407..... 186
Wahl *v.* Barroll, 8 Gill, 239..... 177
Walsh *v.* Boyle, 300 Md. 262..... 226
Walsh *v.* McBride, 72 Md. 45..... 227
Walsh *v.* McIntyre, 68 Md. 402.....161, 163
Waltemeyer *v.* Baughman, 63 Md. 200..... 158
Ware *v.* Richardson, 3 Md. 505..... 53, 57
Warfield *v.* Rose, 38 Md. 85..... 177
Warner *v.* Williams, 93 Md. 517..... 257
Waters *v.* Riggin, 19 Md. 536..... 74
Waters *v.* Snouffer, 88 Md. 391..... 172
Weber *v.* Fickey, 52 Md. 500..... 69
Webster *v.* Pole Line Co. 112 Md. 416.....214, 215, 219
Weller *v.* Pollitt, 104 Md. 172..... 82
Welsh *v.* Gist, 101 Md. 606..... 9
West *v.* Pusey, 113 Md. 569..... 126
Weyler *v.* Gibson, 110 Md. 636.....191, 204
Whalen *v.* R. R. Co. 108 Md. 11; 17 L. R. A. N. S. 130.....101, 102
White *v.* Flannigan, 1 Md. 525.....192, 195, 220
White *v.* McClellan, 62 Md. 347..... 69
Whitridge *v.* Baltimore, 103 Md. 412..... 85
Wickes *v.* Caulk, 5 H. & J. 36..... 109
Wickes *v.* Wickes, 98 Md. 307.....158, 164, 165, 167, 168, 169
Wilkins *v.* Somerville (Vt.), 11 L. R. A. N. S. 1183..... 121
Willard *v.* Ramsburg, 22 Md. 217..... 128
Winter *v.* Gorsuch, 61 Md. 180..... 80
Winter *v.* White, 70 Md. 305..... 93
Woelfel *v.* Evans, 74 Md. 346..... 35, 36
Wood *v.* Ramsey, 71 Md. 9..... 86
Wooton *v.* White, 90 Md. 64..... 239
Worthington *v.* Lee, 61 Md. 530.....42, 43, 56
Yost *v.* Maag, 104 Md. 92..... 86
Young *v.* Marshall, 4 Md. 362..... 167
Young *v.* Ward, 86 Md. 413..... 155
Younge *v.* Guilbeau, 3 Wallace, 636; 18 L. Ed. 263..... 116
Zimmerman *v.* Hafer, 81 Md. 347..... 10
Zittle *v.* Weller, 63 Md. 190.....82, 87, 93

PART I.

TITLE

To

REAL AND LEASEHOLD ESTATES.

CHAPTER I.

WHAT IS TITLE?

Title is the *means or mode* whereby an *estate in real property* is acquired.

Lord Coke's definition of Title has become a classic. Title is *Justa causa possidendi quod nostrum est,* and signifieth the means whereby a man cometh to land, *et dicitur titulus a tuendo,* because by it he holdeth and defendeth the land. *Tome Institute v. Davis,* 89 Md. 591, 606.

Austin, in his work on Jurisprudence, defines title as the collection of "facts or events on which by the dispositions of law rights arise or come into being, and also facts or events on which by the disposition of law they terminate or are extinguished." Vol. 2, p. 902.

For practical purposes, our inquiry may be confined to the different modes of acquiring rights over land. For, according to the common law, rights over lands are never lost or abandoned, so as to become the property of nobody. A mode of losing such a right is always a mode of acquisition by somebody else. For our purpose, therefore, the word "title" may be taken to mean simply *"mode of acquisition."* 2 Blackstone Comm. 195-199 divides titles to lands, viewed from the standpoint of its progressive development, into several stages, namely:—

Naked Possession.
Right of Possession.
Right of Property without Possession, and—
Right of Property United with the Right of Possession.

To illustrate, if a disseisor enters upon the land of another and evicts or turns the true owner out of possession thereof, although in one sense, as between him and the true owner of the land, he has no right or title whatever to the land, yet, as to all the world but him the *possession* so gained gives him complete dominion over and right to the land, and constitutes, in the eye of the law, a *prima facie* title thereto. In the meantime, however, the one who has been wrongfully evicted has a *right to the possession* which the disseisor has usurped and retains, so that there is a naked *possession* in one and a *right* to the immediate possession in the other.

In every State, where the English common law prevails, possession of lands for a period of time sufficiently long is held to divest the owner thereof of his right to retain his possession thereof without the aid of any legal process. If, therefore, in the case just supposed, this possession shall have been continued by the disseisor for the requisite length of time, nothing will remain in the original owner but a *right of property,* while the *possession* and *right of possession* will become united in the disseisor. It only remains, then, for the right of *property* to become united with the *possession* and *right of possession* to perfect the disseissor's title.

And here again, for the sake of quieting title, there is in every State a period beyond which no man may enforce his naked *right of title,* after he shall have lost his *right of possession;* and if, in the case supposed, he suffers the disseisor to retain the possession beyond this prescribed period of time, no one can call in question the right of property as well as of possession of the latter, and he thereby becomes clothed with a complete title to the land. "It would seem that the perfection of title consists in the union of *possession* with the *right of possession,* for when these meet in the same person he cannot be rightfully dispossessed. In other words, he is the lawful owner of the property." Walker's American Law, 317.

CHAPTER II.

HISTORY OF LAND TITLES IN MARYLAND.

All the land in this country now owned by private individuals formerly belonged either to the Federal Government, to an individual State or to a foreign nationality, which disposed of it to an individual proprietor before that particular territory became a part of the United States.

Maryland, as you will remember, was one of the original thirteen British colonies. The British claim of dominion over the land embraced within these colonies was based upon discovery, consummated by actual possession, the migratory Indian tribes being regarded as being possessed of a mere right of occupancy. *Johnson's Lessee v. McIntosh,* 8 Wheat. 543, 572, 5 L. Ed. 681, 688.

Charles I granted the land included within the present boundaries of Maryland to Cæcelius Calvert, Lord Baltimore, to be held in free and common usage, the feoffee rendering therefor two Indian arrows at the Castle of Windsor yearly on Tuesday in Easter Week, and the fifth part of all gold and silver found. At the time of the American Revolution, most of the lands within the State had already been granted by the Lords Proprietary, to individuals and corporations in private ownership, and the rights of such private owners, except in so far as they may have been confiscated for disloyalty to the new Government, were not affected by the transfer of sovereignty to the new State. Those lands, however, which had not been granted away by the Lords Proprietary, together with the confiscated lands, became the property of the new State,

Morris v. U. S. 174 U. S. 196, 230; 43 L. Ed. 946, 958, and have since been disposed of by the State to private individuals. This disposition has been made either by special legislative grants of particular lands to particular individuals, or in pursuance of a regular statutory system, established for the purpose, providing for the survey and sale thereof under the superivsion and control of the Land Office, to persons making formal application to the Commissioner of the Land Office. Code, Art. 54. The grant of land thus made by the State is known as a patent thereof. So much, in brief, for the history and method of acquirement of title by the individual from the State.

CHAPTER III.

KINDS OF TITLE.

The classical common law division of title is into:

1. TITLE BY DESCENT.
2. TITLE BY PURCHASE.

1. TITLE BY DESCENT.

An estate by descent is one which is acquired by a person on the death of an ancestor by right of representation as his heir. The title is said to be cast on the heir without his consent and his acceptance is not necessary to vest the title in him, nor can he, by any disclaimer thereof, divest himself of the title thus acquired. 2 Bl. Comm. 201.

2. TITLE BY PURCHASE.

By Title by Purchase, we understand every other kind of title than title by descent, and that whether the title is created by the voluntary acts of the parties or arises by operation of law. Unlike the case of title by descent, which is cast upon the heir *eo instanti* upon the death of the ancestor, regardless of the will of the former, title by purchase can arise only in the case of one who, by express words or by conduct indicating his intention so to do, accepts the title. No one can be compelled to accept a title by purchase, unless by valid deed or contract he has placed himself under a legal obligation to do so. Titles by purchase, therefore, include those acquired by sale or gift, by devise, by adverse possession, or, indeed,

in any other manner than by descent. *Hall v. Jacobs,* 4 H. & J. 245, 254.

In one class of cases, however, there is title by descent even in case of a will. When a man by his will devises property to his children, it is but fair to presume that he intended that they should take the property under the will—that is, they would take it by purchase, and not by descent. But in England, title by descent was favored by the courts—first, because the lands in the hands of the heirs-at-law by descent were chargeable with the payment of the ancestor's debts, and also because the common law favored the right of escheat upon the failure of heirs on the part of the ancestor from whom the lands descended.

On the other hand, land acquired by purchase was not liable for debts, and upon the death of the owner it descended, free from his debts, first, to the heirs on the paternal side, and, upon failure of such heirs, then to the heirs on the part of the mother. Moreover, title by descent was considered the worthier title.

From these considerations, there was evolved the rule that where a will gave to the devisee the same estate in quantity and quality which he would have taken as heir-at-law, had there been no will, he was adjudged to take, not under the will, but by the worthier title as heir, by descent or operation of law. *Donnelly v. Turner,* 60 Md. 81, 83; *Chew v. Tome,* 93 Md. 244, 253. But, in order that this rule may apply, the estate devised by will must be identical, both as to quantity and as to quality, with that which would have descended to the devisee as heir. Slight differences will suffice to take the case out of the rule. If the estate is devised with any other limitations or in any other shape than the course of descents would direct, it is held by title by purchase. *Latrobe v. Carter,* 83 Md. 279, 285. For example, if a person gets an equitable estate under a will, while if he took

as heir he would get a legal estate, he takes by purchase. Thus, again, estates in coparcenary and in common, are, for all practical purposes, the same in this country, yet there are slight technical differences. A devise to testator's children share and share alike creates a tenancy in common. In case of intestacy, the estate descends to the same children as coparceners. The rule, therefore, would not apply to such a devise, and the children would take by purchase, and not by descent. *Gilpin v. Hollingsworth,* 3 Md. 190, 194. The importance of this rule under the provisions of our Statute to Direct Descents will hereafter fully appear.

CHAPTER IV.

DESCENT.

Upon the death of the owner of an estate of inheritance, without leaving a will, the estate usually passes, subject to the rights of the surviving husband or wife, to persons designated by the law to take in such case by virtue of their relationship to the decedent, such persons being known as the decedent's heirs. Title by descent is the title whereby a man, on the death of his ancestor, acquires his estate by right of representation as his heir-at-law. 2 Bl. Comm. 200, etc. No one can be an heir to personal property, which upon the death of the owner becomes assets in the hands of his executor or administrator and passes under the provisions of Article 93 of the Code. The person who is to take as heir is not determined until the moment of the death of the ancestor. *Nemo est haeres viventis* is a maxim of equal effect at law and in equity. The interest of the expectant heir is merely expectant until the death of the ancestor, and he can claim no right and maintain no action or suit in respect to the property of that ancestor during his lifetime. His rights depend upon a future inheritance that may, by possibility, never occur. The fact that the ancestor may be insane or otherwise incapable of managing his estate makes no exception to the general principle. *Sellman v. Sellman,* 63 Md. 520, 522; *Bradford v. MacKenzie,* 89 Md. 763, 765. In common parlance, however, persons are recognized as possible heirs to a living person if they should survive him, and, recognizing this custom, the common law employed the two expressions—heirs presumptive and heirs apparent. An heir presumptive is one

who would be the heir if the ancestor were to die at the contemplated time, but whose possibility of inheritance may be destroyed by the birth of someone more closely related to the ancestor, as well as by the death of the party before the ancestor. An heir apparent is one who was to inherit if the ancestor died in his lifetime. *Mitchell v. Mitchell,* 2 Gill 231, 239. But, as we have seen, until the death of the ancestor there is no heir in any proper sense of the term, and the relations of heir apparent and heir presumptive have no legal importance and give rise to no legal rights.

The heir has always been a favorite of the common law, and no act of the ancestor short of an unequivocal disposition of the inheritance by will will suffice to bar him of his inheritance. He can be disinherited only by express words or necessary implication. *Rea v. Twilley,* 35 Md. 409, 411; *Stewart v. Pattison,* 8 Gill 46, 57. His title is founded on the law (which is certain) and cannot, therefore, be defeated by conjecture. *Beall v. Holmes,* 6 H. & J. 205, 209; *Ridgely v. Bond,* 18 Md. 433, 448. And even where a will disposing of all the ancestor's property is produced, if it be shown that the omission of the name of an heir, especially if it be that of a child or grandchild of the testator, is the result of an accident, and that the testator fully intended that such heir also should take under the will, such heir will be permitted to take the share of the ancestor's estate to which he would have been entitled, if the ancestor had died intestate. In fact, the failure to mention an heir in the will raises a *prima facie* presumption that the omission was accidental and imposes on the devisees named in the will the burden of establishing that the omission was deliberate and intentional. But, more that this, though the intention of the testator to disinherit the heir be ever so apparent, the latter will, nevertheless, inherit, unless by the will, the testator gives the estate to somebody else. *Bourke v. Boone,* 94 Md. 472, 477; *Welsh v. Gist,* 101 Md. 606, 612.

The reason for this rule is that the law provides how a man's estate at his death shall go, unless he by his will *plainly* directs that it shall be disposed of differently. An explicit and unequivocal declaration, therefore, that the heir shall not inherit, will be wholly ineffectual to defeat his right, unless the estate be given by the will to someone else. *Zimmerman v. Hafer,* 81 Md. 347, 355, 357. As to devise by implication see in addition to *Zimmerman v. Hafer, supra, Smith v. Smith,* 113 Md. 495. When a devise is made to persons other than the heir, but it does not affirmatively appear that such devisees were intended to have the beneficial interest in the property, a trust will be raised by implication of law in favor of the heir. Thus, if property is devised upon trusts which are not sufficiently or validly declared in the will, it follows that a trust arises by operation of law in favor of the heirs of the testator. *Saylor v. Plaine,* 31 Md. 158, 164, 167; *Rizer v. Perry,* 58 Md. 112, 118.

WHO IS HEIR.

The heirs of a decedent are those whom the law declares to be his heirs. Under all systems of law, only those persons can claim as heirs ofa deceased intestate who are in some manner *related* to him.

Relationship is of two kinds—(a) *consanguinity,* and (b) *affinity.*

a. *Consanguinity* is that relationship which arises from a community of blood, and exists between persons who are descended from a common ancestor, called the "stirps" or root. Consanguinity again is divided into (1) *lineal* and (2) *collateral.*

1. *Lineal Consanguinity* exists between persons who descend one from the other in the direct or single line of descent. Thus, father, grandfather, etc., in the ascending

series, and son, grandson, etc., in the descending series, are related by lineal consanguinity. *Suman v. Harvey,* 114 Md. 241, 259.

2. *Collateral Consanguinity* is where the relationship is traced through different lines of descent up to the common ancestor. Parties so related do not descend one from the other. Thus, brothers, cousins, nephews, uncles, etc., are related by collateral consanguinity respectively through the common father and grandfather. *Suman v. Harvey,* 114 Md. 241, 260.

As used in the Maryland Statute to Direct Descents, the term "collaterals" means the collateral relations of the intestate. All persons related by consanguinity can trace their descent from a common ancestor to whom they are both lineally related. Yet as to one another the intestate and claimant may be collaterally related. *Suman v. Harvey, supra,* 259, 260.

b. *Affinity* is the relationship created between parties by marriage, either of themselves of their respective relatives. Thus, husband and wife and their respective fathers-in-law and mothers-in-law, etc., are related by affinity.

And now, having determined these preliminary matters, let us see who are a person's heirs, firstly, at common law, and secondly, under the present statute law of Maryland.

CHAPTER V.

DESCENT AT COMMON LAW.

At common law, the course of descent was determined by what were known as the seven canons of descent, as follows:

1. Inheritance shall lineally *descend* to the issue of the person who last died actually seised *in infinitum,* but shall never lineally *ascend.* Thus, land could not pass to the father or grandfather of the decedent upon the latter's death although it could pass to his uncle, the brother of his father, and might from him pass to the father.

2. The male issue shall be admitted before the female. *Goodwin v. Keerl,* 3 H. & McH. 403.

3. Where there are two or more males in equal degree, the eldest only shall inherit. This was known as *primogeniture.* Females in equal degree shall, however, inherit equally. Likewise in the case of *Gavelkind or Borough English in Kent,* real estate descended to all sons equally as coparceners. Littleton's Tenures, Sec. 265.

4. The lineal descendants, *in infinitum* of any persons deceased shall represent their ancestors—that is, shall stand in the same place as the ancestor would have done had he been living. Doctrine of Representation.

5. On failure of lineal descendants of the person last seised, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser, subject to canons, 1, 2, 3, 4.

These five canons are called primary, as they determine the method of descent from the persons last seised to his issue; or, if there should be no such issue, then to his collateral rela-

tives of the blood of the first purchaser—that is, to persons not lineally related to the person last seised, but related to him by reason of the fact that they are descended from the same ancestor. As between such collateral kindred, those standing in an equal degree of relationship to the intestate share the inheritance, to the exclusion of those in a more distant degree. In calculating the degrees of relationship for this purpose, the common law adopted the rule that the intestate and a particular claimant were to be regarded as in the degree of relationship to one another which correspond to the number of degrees between their common ancestor and the one of his two descendants who was most distant from him. So, if the claimant and intestate were both grandchildren of the common ancestor, they were regarded as related to each other in the second degree; while if one was a grandchild and the other a great-grandchild, they were related in the third degree. By the Civil Law method of computing relationship, on the other hand, the degrees between the common ancestor and the intestate are added to those between the former and the claimant, in order to ascertain the degree of relationship; so two grandchildren of a common ancestor are related in the fourth degree, and a grandchild and a great-grandchild in the fifth degree. As regards the devolution of personalty, the common law method of computation is adopted in Maryland by statute. Code, Art. 93, Sec. 134.

This method of reckoning degrees of kinship as determining the order of succession is now superseded by the statutory regulations of the descent, which prescribe the order in which the near relatives of the intestate shall take his property, designating by the name of their relationship the persons who are to take and the order in which they are to take. Consequently it is only where the decedent's property goes to kindred outside this series of specially designated relatives that the method adopted at the common law is resorted to in de-

termining the order of succession. *Hoffman v. Watson,* 109 Md. 532, 548. For example, where the contest is between a grandniece and a cousin of the intestate, at common law, the relationship between the grandniece and intestate would be determined with reference to intestate's father, the great-grandfather of the grandniece; of the intestate and his cousin with reference to their common grandfather. It would be erroneous to trace the relationship of both grandniece and cousin to intestate in relation to intestate's grandfather. *Ibid,* 555.

The remaining two canons of descent are called the secondary canons, because they are applied where there are no descendants, and the feud being old, the first purchaser is not known. They are as follows:

6. The collateral heir of the person "last seised" must be his next collateral kinsman of the whole blood—that is, it was necessary that the heir and the person last seised must both be descendants, not only from the same person, but from the same marriage of that person—that is, the claimant must have been a kinsman of the whole, and not of the half blood. So, one could not inherit from his half-brother, even though the land had descended from their common parent to such half-brother, and though otherwise the land would escheat for want of heirs.

7. In collateral inheritance, the male stocks shall be preferred to the female—that is to say, kindred derived from the blood of the male ancestor, however remote, shall be admitted before those from the blood of the female, however near, unless the lands have in fact descended from a female. 2 Bl. Comm. 207-234.

The preference of males to females and the law of primogeniture were early regarded as in contravention of the doctrine of equality cherished by the founders of this country, and were abolished in most States shortly after the Declaration of

Independence. In 1786, the Legislature of this State, impressed with the conviction that the rules and canons of descent as established in England, which originated from the Feudal System, were contrary to justice and ought to be abolished, framed a new scheme or system of descents, in many of its features essentially variant from that adopted and prevailing in England. *Stewart v. Jones,* 8 G. & J. 1, 28. This law, Act of 1786, Ch. 45, was repealed and re-enacted with amendments by the Act of 1820, Ch. 191, which, substantially unmodified, is to be found as Art. 46 of Code.

As we shall presently see, the old Common Law rule of descents has been materially changed by statute, but in one class of cases it still remains in full force and effect in Maryland. By the Act of 1831, Ch. 311, Sec. 11 (Art. 46, Sec. 24, of the Code of 1888 and 1904) it was provided that where a trustee in fee tail or fee simple shall be seised of the naked legal title in any lands, tenements or hereditaments, without having, or being entitled to, any beneficial interest or estate therein, and said trustee shall die, the said legal estate shall descend to such person or persons as would have become the heirs of such trustee at common law. *Duffy v. Calvert,* 6 Gill, 487, 516; *Druid Pk. Heights Co. v. Oettinger,* 53 Md. 46, 61. And, therefore, it follows that in all suits in equity affecting the trust property, if the trustee is dead, his common law heirs are necessary parties. *Hawkins v. Chapman,* 36 Md. 83, 98. As to disclaimer by the heir, see *Dodge v. Dodge,* 109 Md. 164, 168. The joinder of the heir in a suit for the appointment of a new trustee would amount to such disclaimer. *Equitable* estates descend under the Maryland Act to Direct Descents, but *the naked legal title of the trustee* descends still as at common law. *Latrobe v. Carter,* 83 Md. 279, 297.

CHAPTER VI.

MARYLAND LAW OF DESCENTS.

The common law rules of descent have been considerably modified by statute in England, and in this country have been substantially replaced by a new system of inheritances based on the Roman Civil Law. At common law, as we have seen, the right of succession to real property upon the death of the owner was determined by the relationship of the claimant to the person who last died seised in deed of the land. In England now, descent is traced to the last purchaser; while in this country in most of the States descent is traced from the person last entitled to the land, irrespective of whether he was seised at all or whether he obtained the land by purchase or descent. The Maryland Statute of Descents (Art. 46, Sec. 1) by its terms seems to preserve the common law rules, for it provides for descent only in case of the death intestate of a person "Seised of an estate in lands, tenements or hereditaments," and in *Chirac v. Reinecker,* 2 Pet. 613, 625, it was so held by the Supreme Court of the United States.

It was an old and well established rule of the common law that where the reversion is cast upon the heir subject to a prior life estate, such an heir is not so seised as to constitute him the *possessio fratris* or *stirps* of descent, if he died during the existence of the life estate; and that the person claiming as heir, in the event of such death, must claim from a previous ancestor last actually seised of the inheritance. Nevertheless, while the estate is still thus in expectancy, subject to the prior life estate, the intermediate heir in whom the reversion may vest, may do acts, which the law deems equivalent

to an actual seisin, which will change the course of the descent, and make a new root of inheritance. Thus, he may by exercising acts of ownership over it, as by granting it for life or in tail, or by devising it, or changing it, appropriate it to himself, and by that means change the course of descent. The intermediate heir would thus make himself a new *stirps* of descent. This old common law rule has not been changed by our Act to direct descents. *Conner v. Waring*, 52 Md. 724, 733.

In this country, primogeniture and the preference of males to females have been abolished, and all those in the same degree of relationship, whether male or female, share equally in the inheritance. The old common law rule that land can never lineally ascend—that is, that it cannot pass to the father or grandfather of the owner upon his death—has likewise been abrogated. The statutes in this country generally provide for the passing of the decedent's real estate to his father or other in certain cases. The common law rule that collaterals of the half-blood could under no circumstances inherit has likewise been changed by statute so as to permit them to inherit under certain circumstances.

These are some of the more important changes in the old common law canons of descent made by the statutes of this country. Let us look now at our Maryland statute somewhat more closely. It is fee simple estates and such estates, as by statute are declared to be equivalent to fee simple estates, that descend by virtue of the statute. Fee tails general, created since January 1, 1788, are converted by the statute into fee simple estates and descend as such. Code, Art. 46, Sec. 1.

On the death of a person intestate, seised of any of the estates just mentioned, if such persons leave a child or children or their descendants, then such estate passes to such child or children and their descendants equally. (Sec. 2.) If there is only one living child, and there are no descendants of a

deceased child, such living child takes the whole estate. If there are several living children, and no descendants of a deceased child, such living children take equal shares. If there is a living child or children, and descendants of a dead child or children, the descendants of such child or children stand in the place of, or represent, their deceased parent or parents, and take the share or shares to which their respective parents, if living, would have been entitled. By Sec. 27 it is provided that representation among descendants shall exist *"ad infinitum."* This is what is meant by saying that such descendants take *"per stirpes"* and not *"per capita."* It is, therefore, the rule that the child or children of the intestate and their descendants take in equal shares, no matter in what manner the ancestor may have acquired the estate of inheritance.

THREE CLASSES OF DESCENT.

In those cases, however, in which the intestate leaves no children or descendants surviving him, the course of descent depends upon, and varies with, the method of acquirement of the property by the intestate. There are three classes of descents provided by the Statute to Direct Descents in the event of the death of the intestate without leaving children or descendants, as follows:

1. WHERE THE PROPERTY DESCENDED TO THE INTESTATE ON THE PART OF THE FATHER. (Sec. 3-10 inclusive).

2. WHERE THE PROPERTY DESCENDED ON THE PART OF THE MOTHER. (Sec. 11-18 inclusive).

The words "descended on the part of the father" and "descended on the part of the mother," show an anxiety to preserve the line of descent in the lineage from which the estates were derived. *Posey v. Budd,* 21 Md. 477, 488. These two classes of descent give rise to what are often called ancestral estates.

3. WHERE THE ESTATE VESTED IN THE INTESTATE BY PURCHASE OR DESCENDED TO OR VESTED IN HIM IN ANY OTHER MANNER THAN BY DESCENT ON THE PART OF HIS FATHER OR MOTHER. (Sec. 19-23 inclusive).

Under the Maryland scheme of descents in the case of all three classes, all the persons named in one section must be exhausted before any person in any subsequent section will be permitted to inherit. *Hoffman v. Watson,* 109 Md. 532, 548.

EX PARTE PATERNA.

1. WHERE PROPERTY DESCENDED TO THE INTESTATE ON THE PART OF HIS FATHER.—If the decedent leave no children or descendants, it shall pass to the father. (Sec. 3.)* If no father be living, then to the brothers and sisters of the intestate of the blood of the father and their descendants equally. (Sec. 4.) *Dudrow v. King,* 117 Md. 182, 185. This provision it will be noticed, makes no distinction between whole and half blood, provided only the brothers and sisters had the same father as the intestate. They need not have had the same mother. *Stewart v. Jones,* 8 G. & J. 1, 28. If a decedent leave no brother or sister as aforesaid, child or children, grandchild or grandchildren, or other descendants from such brother or sister, then to the grandfather on the part of the father; if there be no such grandfather, then to the descendants of such grandfather and their descendants in equal degree equally. (Secs. 5, 6; Acts 1912, Ch. 92;) *Suman v. Harvey,* 114 Md.

*This section, as well as the corresponding Section II, relating to estates *ex parte materna,* has been characterized as "manifestly absurd," Venable's Syllabus, "Title" p. 4, note 3. Several explanations have been suggested, no one of which is completely satisfactory. See Reeve on The Law of Descents in The Several United States of America, p. 255 and fol.

241; *Elwood v. Lannon,* 27 Md. 200, 208. "Descendants" throughout this article is not limited to children, but means descendants indefinitely, of every degree. *Hoffman v. Watson,* 109 Md. 532, 545, 546, 549.

If there be no descendants of such grandfather, then to the father of such grandfather, and if none such living, then to the descendants of the father of such grandfather, in equal degree; and so on, passing to the next lineal male paternal ancestor; and if none such, to his descendants in equal degree, without end. (Sec. 7.) If there be no paternal ancestor or descendant from such ancestor, then to the mother of the intestate. (Sec. 8.) If no mother living, then to her descendants in equal degree equally. (Sec. 9.) If no mother living or descendants from such mother, then to the maternal ancestors and their descendants, in the same manner as is above directed as to the paternal ancestors and their descendants. (Sec. 10.) Query: Can female paternal or maternal ancestors and their descendants inherit under these provisions? It might happen that the intestate acquired the property on the part of his father from a female paternal ancestor, yet it may be argued that under the above provisions no female paternal ancestor can in any event inherit such an estate.

If there be no descendants or kindred of the intestate as aforesaid to take the estate, then the same shall go to the husband or wife, as the case may be. *Vogel v. Trunt,* 110 Md. 192; and if the husband or wife be dead, then to his or her kindred in the like course as if such husband or wife had survived the intestate and then had died entitled to the estate by purchase; and if the intestate has had more husbands or wives than one, and all shall die before such intestate, then the estate shall be equally divided among the kindred of the several husbands or wives in equal degree equally. (Sec. 23.) The fact that the wife of the intestate happens to have been an illegiti-

mate child can in no manner affect her right to inherit under the provisions of this section. *Southgate v. Annan,* 31 Md. 113.

By an estate on the part of the father, *ex parte paterna* is meant not only an estate inherited directly from the father, but also an estate inherited from an intestate whose relationship to the heir is traced through the father. And this is true, even though, according to the principles of the common law, the descent passes directly from the intestate to the heir, because the title of the heir must be founded upon the descent by the heir from the father and the relationship of the ancestor to the father. Thus, if a brother and sister have the same father, who is dead, but different mothers, and the sister, to whom certain real estate descended upon the death of the father, dies intestate, and thereupon the land descends to the brother, as her sole heir at law, this land is regarded as having descended to him on the part of the father. He derived his inheritable blood to his sister, from or through the father, and consequently by the medium of the father. The descent, therefore, to him, though immediately from the sister, was mediately from the father, and consequently must be deemed a descent on the part of the father. *Stewart v. Jones,* 8 G. & J. 1, 27, 28. Similarly, where a party inherited land from his uncle (his father's brother), his father having predeceased both, it would be held that the heir took immediately from his father and upon his death intestate, the land is regarded as *ex parte paterna,* and goes to his heirs of his father's blood. *Garner v. Wood,* 71 Md. 37, 41, etc. In *Elwood v. Lannan,* 27 Md. 200, 209, the Court of Appeals speaks of "real estate descended from the father," when dealing with the rule of descent in case of estates descended on the part of the father, but no special significance is to be attached to these words.

The general rule is that if one who has acquired property by descent conveys his interest away and it be conveyed back to

him, he holds thereafter by purchase. *Dudrow v. King,* 117 Md. 182, 186.

This, however, does not follow under all circumstances. Thus, in the case of *Dudrow v. King,* just cited, it was held that where land had descended to the intestate on the part of his father, the fact that the intestate had conveyed the same to a third person with no intention to confer any beneficial interest therein on that third person, who had promptly reconveyed the property to the intestate, did not operate to convert the property from land descended *ex parte parterna* into property acquired by purchase, and it would, therefore, descend as property acquired *ex parte paterna* and brothers and sisters of the half blood of the intestate (having the same father as the intestate) would share equally with intestate's brothers and sisters of the whole blood. *Dudrow v. King, supra.* See discussion in this case on pp. 187-191.

The provisions of the Code which we have been considering provide in many cases for descent to collaterals. We have already seen that, in case of lineal descent, the doctrine of representation applies *ad infinitum.* (Sec. 27.) By this same section, as amended by the Act 1912, Ch. 92, it is provided that there shall be no representation among collaterals after brothers' and sisters' grandchildren. *McComas v. Amos,* 29 Md. 132, 139. As a consequence of the legislation in this State, an illegitimate child will, by virtue of the doctrine of representation, stand in the place of its deceased mother and take the estate to which its mother, if living, would have been entitled. *Barron v. Zimmerman,* 117 Md. 296, 300. Collaterals more remote than the grandchildren of intestate's brothers and sisters do not, therefore, represent their parents, and are excluded from participation in the inheritance by collaterals more nearly related. Thus, an uncle of an intestate without issue is entitled to the whole real estate to the exclusion of the children of a deceased uncle. *Eldwood v. Lannan,* 27 Md. 200, 208.

Prior to April 4, 1912, where an intestate had left as his nearest relatives nephews and nieces and children of deceased nephews and nieces, the nieces and nephews would have taken the whole estate, while the grandnieces and grandnephews would have taken nothing. *Garrison v. Hill,* 81 Md. 206, 211; *Graham v. Whitridge,* 99 Md. 248 289.

If the Collaterals, who are to take, stand in an equal degree of relationship to the deceased and none of them are more remote than grandnieces or grandnephews of the deceased, the property is divided *per stirpes,* and not *per capita.* If, therefore, a brother and a nephew, the son of a deceased brother, be the parties claiming the inheritance, the nephew, by force of the terms of Sec. 27, stands in the same degree with the brother and will take one-half of the estate, being the share to which his father, if living, would have been entitled. And so, if all the brothers and sisters be dead, and the claimants are nephews and nieces, the children of deceased brothers and sisters, the claimants must take, by representation, the same share of the estate as their respective fathers and mothers would have taken, and no more; and if there be more children than one of any particular deceased brother or sister of the intestate, the share to which that brother or sister would have been entitled, if alive, must be equally divided among such children. *McComas v. Amos,* 29 Md. 132, 141. Where the collaterals entitled are all of the same degree, but more remote than grandnieces and grand nephews, they take *per capita* and not *per stirpes.* This rule prevails by virtue of the provisions of Section 19, which declares that the estate shall descend to the brothers and sisters of such intestate of the whole blood and their children, grandchild or grandchildren, and their other descendants in equal degree equally, that is, *per capita,* inasmuch as by the provisions of Sec. 27 (also amended by the Act of 1912, Ch. 92), the doctrine of representation cannot apply to such a case. *McComas v. Amos,* 29 Md. 132, 140.

Thus, where "A" died intestate and without issue, leaving no mother, brother or sister, or any descendants from either, but leaving the children and grandchildren of an uncle and aunts, it was held that the children of the deceased uncle and aunts took *per capita* an not *per stirpes,* to the exclusion of the grandchildren. *Stewart v. Collier,* 3 H. & J. 289; *Hoffman v. Watson,* 109 Md. 532, 550. Similarly, the children of first cousins are more remote than first cousins, and are excluded by them, as representation cannot here apply. *Suman v. Harvey,* 114 Md. 241. It is apparent that the only case in which collaterals in different degrees can be entitled is where the doctrine of representation applies—that is, where none are more remote than grandnephews and grandnieces. In this case, as we have already seen, they take *per stirpes* and not *per capita.* (Sec. 27).

"Representation" is sometimes confused with "descent" or "inheritance." Where claimants undertake to set up a title as arising by representation it means that by virtue of this doctrine they claim to stand in the place of their parents, "by representation to be considered as related to the ancestor in the same degree." Where, however, they claim by "descent" or "inheritance," they claim directly by virtue of their own relationship to the ancestor, although that relationship will have to be traced through their parents. Persons more remote in the collateral line than the grandchildren of the brothers and sisters of the decedent, must always take by "descent" or "inheritance" and never by the doctrine of representation, otherwise the effect of the doctrine would be to exclude them entirely from inheriting. *Hoffman v. Watson,* 109 Md. 532, 547.

It was held in this case that no question of the application of the doctrine of representation can arise under the following facts:—grandnieces of the intestate, being the grandchildren of the sister of the intestate, clearly take before the first

cousins of the intestate, who are the grandchildren of the same grandfather as the intestate. The doctrine of representation could not (prior to 1912) be invoked by these grandnieces because further removed from the intestate than the children of brothers and sisters, and it was, therefore, argued that the first cousins being in nearer degree according to the old common law rules would prevail. But the Court said it was not a question of representation, but of according to the grandnieces the priority secured to them as designated heirs in their own right by virtue of the provisions of Sec. 19 of Art. 46.

EX PARTE MATERNA.

2. ESTATES WHICH DESCENDED TO THE INTESTATE ON THE PART OF THE MOTHER. (Regulated by Secs. 11 to 18, inclusive, of Art. 46.) In this class of cases, the same provisions apply as in the case of property descended *ex parte paterna,* already considered, except that in each case the words "mother" or "maternal" must be substituted for the words "father" or "paternal." See *Billingsley v. Tongue,* 9 Md. 575, 582; *Garner v. Wood,* 71 Md. 37, 38; *Latrobe v. Carter,* 83 Md. 279, 288; *Gantt v. Trott,* 107 Md. 325, 329; *Suman v. Harvey,* 114 Md. 241.

This second species of descent needs, therefore, no special mention or extended treatment. In *Garner v. Wood, supra,* Thos. Holland had taken an estate by purchase. He died intestate, leaving as his sole heir-at-law, his nephew, Thos. Woods, son of his deceased sister. Woods also died intestate. It was held that he took the estate on the part of his mother, and it therefore, *descended* to his heirs of her blood, and he having no brothers and sisters of the blood of his mother, it could not go to his brothers and sisters of the blood of his father only.

DESCENT IN ANY OTHER MANNER.

3. WHERE THE ESTATE VESTED IN THE INTESTATE BY PURCHASE, OR DESCENDED TO OR VESTED IN HIM IN ANY OTHER MANNER THAN BY DESCENT ON THE PART OF THE FATHER OR MOTHER, and there be no child or descendants of such intestate, then the estate shall descend to the brothers and sisters of such intestate of the whole blood and their descendants in equal degree equally. *Kelley v. Harper,* 64 Md. 74, 84; *Garner v. Wood,* 71 Md. 37, 40; *Poultney v. Tiffany,* 112 Md. 630, 633; *Dudrow v. King,* 117 Md. 182, 185.

Descendants here means issue in every degree no matter how remote. Under this description is comprised every individual proceeding from the stock or family of the brothers and sisters of the intestate. And until all such descendants are entirely exhausted, there can be no descent to any of the persons named in the subsequent sections of Article 46. *Hoffman v. Watson,* 109 Md. 532, 545, 546. If there be no brother or sister of the whole blood, children, grandchildren or descendants of such brother or sister, then to the brothers and sisters of the half blood and their descendants in equal degree equally. *Garner v. Wood, supra,* p. 41. But if there be no brother or sister of the whole or half blood, or any descendants from such brother or sister, then to the father; and if no father living, then to the mother. *Donnelly v. Turner,* 60 Md. 81, 84. If there be no mother living, then to the grandfather on the part of the father; and if no such grandfather living, then to the descendants of such grandfather in equal degree equally. *Suman v. Harvey,* 114 Md. 241. If there be no such grandfather or any descendants from him, then to the grandfather on the part of the mother; and if no such grandfather, then to his descendants in equal degree equally; and so on, without end, alternating the next male paternal ancestor and his decendants, and giving prefer-

ence to the paternal ancestor and his descendants. Again, female paternal and female maternal ancestors and their descendants seem to be excluded from all share in the estate. If there are no descendants or kindred of the intestate as just described, then under Sec. 23, the estate by purchase passes to the wife or husband of the intestate, etc. The doctrine of representation as heretofore explained applies also to this class of descents.

Should the owner of land die intestate and without leaving surviving any of the persons enumerated, he dies without legal heirs, and the land passes to the State by escheat. As we shall presently see, an escheat is where the State acquires title to land as ultimate heir, and holds for the benefit of all, when the owner dies seised in fee and without heirs. *Matthews v. Ward,* 10 G. & J. 443, 451. It is where the land falls back into the ownership of the State, from which it was originally derived, because the owner did not dispose of it in his lifetime and died without a will and without heirs. The State thus becomes vested with all the rights, privileges, priorities and appurtenances incident to the land itself and with which it was held by the person, by reason of whose default of heirs it has become escheat. The State thus succeeding to the rights of such persons takes the property subject to all liens and encumbrances imposed upon it by him or those under whom he derives title. *Casey v. Inloes,* 1 Gill, 430, 507.

UNBORN CHILDREN.

At common law, a child *en ventre sa mere* at the time of the death of the intestate was regarded as living for the purpose of taking from him by descent. By Sec. 25 of Art. 46, this rule is limited. Any child or descendant of the intestate, born after the death of the intestate, shall have the same right of inheritance as if born before the death of the intestate; but, in

all other cases, no right in the inheritance shall accrue to or vest in any person, unless such person is in being and capable in law to take, at the time of the intestate's death. *Shriver v. State,* 65 Md. 278, 283.

KINDRED OF THE HALF BLOOD.

At common law, in order that one might inherit as a collateral kinsman of the intestate, it was necessary that both be descended not only from the same person, but from the same marriage of that person—that is, the claimant must have been a kinsman of the whole, and not of the half blood. This rule has been changed by statute in Maryland, as well as in nearly all other States of this country. In the case of ancestral estates, there is now no distinction between the whole and half blood, half brothers and half sisters of the blood of the father sharing equally with whole brothers and whole sisters in estates *ex parte paterna,* and half brothers and half sisters of the blood of the mother sharing equally with whole brothers and whole sisters in estates *ex parte materna.* (Art. 46, Sec. 26); *Lowe v. Maccubbin,* 1 H. & J. 550. In the case, however, of estates which vested in the intestate by purchase or in any other manner than by descent *ex parte paterna* or *ex parte materna,* brothers and sisters of the whole blood and their descendants are preferred to those of the half blood and their descendants, and the latter take only in default of the former. (Sections 19, 20); *Garner v. Wood,* 71 Md. 37, 41, 42.

ILLEGITIMATE CHILDREN.

At common law, a child born out of wedlock was regarded as *filius nullius,* and as consequently bearing no relationship to any persons other than his own offspring. Consequently he could be the heir neither of his own father or mother, nor of

any other person, and no persons could inherit from him except the heirs of his body. 1 Bl. Comm. 459; *Miller v. Ed. Commissioners,* 8 Gill, 128, 130; *Southgate v. Annan,* 31 Md. 116; *Barron v. Zimmerman,* 117 Md. 296, 301.

By the Act of 1825, Chapter 156, the illegitimate child or children of any female, and the issue of any such illegitimate child or children were rendered capable of taking and inheriting both real and personal estate from their mother, or from each other, or from the descendants of each other, as the case may be. But this act made no provision for the inheritance of the mother from her illegitimate children, nor for the inheritance of her legitimate from her illegitimate children and *vice versa. Miller v. Bd. Comm'rs,* 8 Gill, 128, 131, etc. This defect in the law was remedied by the Act of 1868, Chapter 199. (Code, Article 46, Sec. 30.) And now the mother may inherit from her illegitimate children, and if she be dead her lawful heirs shall inherit in like manner as if such illegitimate children had been born in lawful wedlock. *Estep v. Mackey,* 52 Md. 592, 600; *Reese v. Starner,* 106 Md. 50, 52. Moreover, as we have seen, an illegitimate child, will by representation, stand in the place of its deceased mother. *Barron v. Zimmerman,* 117 Md. 296, 300.

Where a man has an illegitimate child by a woman, and subsequently marries her and acknowledges the child, such child is thereby legitimated to all intents and purposes and can inherit and transmit as though born in lawful wedlock. Section 29; *Richardson v. Smith,* 80 Md. 94, 97. This provision of the law is not limited to the children of those who are unmarried and, therefore capable of contracting lawful marriage, but extends as well to the issue of an adulterous connection. The principal object of this legislation was to remove the taint and disabilities of bastardy from the unoffending children whenever their parents did marry, without regard to the deepness of the guilt on the part of their parents in

which they were conceived and born. *Hawbecker v. Hawbecker,* 43 Md. 516, 519, etc. The mere fact of marriage and acknowledgment will not suffice to render the child the heir of the husband acknowledging him; it must be affirmatively shown that the child was his illegitimate child, especially where the child may have been the legitimate child of the former husband. *Scanlon v. Walshe,* 81 Md. 118, 131.

ADOPTED CHILDREN.

The adoption of children is unknown to the common law and exists only by virtue of statute. *Hillers v. Taylor,* 108 Md. 148, 155; *Fisher v. Wagner,* 109 Md. 243, 247. In this State, the adoption of children is provided for by the Act of 1892, Chapter 244, (Art. 16, Sec. 68 to 73, inclusive.) The effect of a decree of adoption is to entitle the child so adopted to the same rights of inheritance and distribution as to the petitioner's estate as if born to the petitioner in lawful wedlock. Where such a child inherits property from its adopted parent or parents, upon its dying intestate without issue, the property thus inherited shall descend and be distributed to the same persons who would take the same by inheritance and in the course of distribution as if the child had been the child of the adopted parents and born to them in lawful wedlock. Our statute makes no provision for the adoption of adults. *Hillers v. Taylor, supra.*

ADVANCEMENT AND HOTCHPOT.

An advancement is a giving, by anticipation, to a child or other relative, of a part or whole of what the donee would receive on the death of the donor intestate, with the result, generally speaking, that the amount thereof is deducted in determining the share of such donee after the donor's death.

An advancement to a husband by his father-in-law is an advancement to his wife. *Dilley v. Love*, 61 Md. 603; *McCabe v. Brosenne*, 107 Md. 490, 495.

This is not a common law doctrine, but is based exclusively on statutes. The Maryland Statute (Act 1820, Ch. 191, Sec. 5) is Section 31 of Article 46 of the Code. It provides that a child or children of the intestate, or their issue, who may have received from the intestate any real estate by way of advancement shall not be entitled to claim a share of said intestate's estate, unless he or they shall bring such advancement or the value thereof at the time when received into the common stock, or hotchpot, if there be another child or children unprovided for; such person or persons, having received such advancement, may, however, elect to come into partition with the other parceners on bringing such advancement, or its value as aforesaid, into hotchpot with the estate descended. *McCabe v. Brosenne*, 107 Md. 490, 494. This statute relates only to cases of intestacy; it has no application where the decedent left a will. *Justis v. Justis*, 99 Md. 69, 80. This, of course, does not mean that the doctrine of advancements has no application to the case of a testator who leaves a will and directs that advancements made by him to children during his lifetime should be charged to such children. *Safe Dep. Co. v. Baker*, 91 Md. 297; *Baker v. Safe Dep. & Trust Co.* 93 Md. 368, 376. What is meant is merely that the statutes in regard to advancements have no application, as a general rule, in the case of partial intestacy, since it is presumed that the will would have mentioned any gifts which the testator intended should be regarded as advancements. It is not necessary to constitute an advancement that the provision should take place in the parent's lifetime. A portion secured to the child *in futuro*, or to commence after the father's death, or upon a contingency, is an advancement. An advancement must be distinguished, firstly, from a debt due by the child to the parent

or from the parent to the child, and, secondly, from an absolute gift or conveyance having no view whatever to a portion or settlement.

Where a gift from parent to child is unexplained at the time, or a conveyance is silent as to its design, the courts must be called upon to determine its effect, and that means to determine the intention of the grantor in making the conveyance. In some States, as in Massachusetts, it must be proved to have been intended as an advancement, or it will be deemed an absolute gift. But in England and in many of the States of this Union, including Maryland, the presumption of law is that such a conveyance by parent to child is an advancement; but this is a rebuttable presumption and may be disproved by competent evidence of a contrary intent. The rule thus is that the equitable rule of equality will prevail in the absence of such evidence. *Parks v. Parks,* 19 Md. 323, 333. And this evidence may consist of proof of expressions of a contrary intention of the grantor at the time of the conveyance, or the circumstances surrounding the transaction may be such as to establish a different intent. *Frank v. Auerbach,* 72 Md. 580, 583; *McCabe v. Brosenne,* 107 Md. 490, 495.

The intestate will be presumed to have intended to treat his heirs equally. *Graves v. Spedden,* 46 Md. 527, 533. Those to whom he has already made conveyances of land will be required to bring the land into hotchpot, so that it will be regarded and treated as part of the intestate's estate. *Clark v. Wilson,* 27 Md. 693, 700. In contemplation of law, a father's natural love and affection move equally to his children, and the delivery or conveyance of a part of his estate on that consideration to one of them supposes like, if not equal, beneficence to be intended to the others, and for that reason it implies that the donee shall take and hold the portion so conveyed in virtue of the right to inherit with the other children the father's estate. *Parks v. Parks,* 19 Md. 323, 333. You will, of course,

understand that the heir to whom the advancement has been made is not required at all events to bring the land into hotchpot, because the advancement must have been an absolute gift to him. He is merely required to do so at his election, as a condition of participating as an heir in the rest of the real estate of the intestate. If he elects to come into hotchpot, then the land advanced must be brought into hotchpot, or he may retain the same and pay the value thereof at the time of its advancement into hotchpot. (Art. 46, Sec. 31).

CHAPTER VII.

TITLE BY ADMINISTRATION.

Upon the death intestate of the owner of chattels real (leasehold property) the title thereto vests in his administrator, and can only be transmitted through the instrumentality of letters of administration granted by a court of competent jurisdiction to such administrator. *Schaub v. Griffin,* 84 Md. 557, 567; *Holzman v. Wager,* 114 Md. 322, 333, etc. The details of the law pertaining to the administration and distribution of estates of decedents is properly treated in text-books on Testamentary Law. Only those features thereof that more particularly relate to the transmission of the title of leasehold estates will be here considered.

At common law, in England, chattels real, like all other forms of personal property, passed to the administrator appointed by the Ecclesiastical Court from among the intestate's next of kin, who usually, whether rightly or wrongly, appropriated to his own use all the surplus after payment of debts, until, by statute (22 and 23 Car. II, Ch. 10), it was provided that such surplus should be distributed in a certain manner to the widow and children, or, in default of children, to the next of kin. Such a statute we have in Maryland in the Act of 1798. (Code, Art. 93.) Upon the grant of letters of administration, the title to decedent's leasehold property passes to the administrator for the purpose of administration. *Linthicum v. Polk,* 93 Md. 84, 93. The grant of such letters is never presumed from the lapse of time, however long continued. The granting of letters of administration by the Orphans' Court is a judicial act and, like all such acts, must be proved by the

record. *Smith v. Wilson,* 17 Md. 460, 461. Upon the grant of such letters, the title of the administrator, although it then for the first time arises, relates back to the time of the death of the deceased. *Dempsey v. McNabb,* 73 Md. 433, 439.

Where leasehold property has been specifically bequeathed to a certain legatee by the will, the legatee gets an inchoate title, and when the decedent's debts are paid and the executor assents to the delivery of the property to the legatee, the title of the latter to the property at common law was perfected. *Matthews v. Turner,* 64 Md. 100, 121; *Kopp v. Hermann,* 82 Md. 339, 348. Nothing more is necessary, and upon the title thus perfected, the legatee may maintain ejectment. *Crean v. McMahon,* 106 Md. 507. No record evidence of the transmission of title, whether in case of testacy or intestacy, however, thus existed. The only record of such transmission appeared on the administration accounts in the Orphans' Court, where the executor or administrator would crave allowance for such and such leasehold property turned over to a certain legatee or distributee. So far as the records of deeds went, there would be an unexplained gap. In all cases, both of testacy and intestacy, the assent of the executor or administrator to the delivery of the property is necessary in order that he may be protected against the creditors of the decedent, and, in case of a will, against insufficiency of assets to pay all legacies in full. *Ibid.* p. 520.

In order to provide such record evidence of the transmission of title to leaseholds, the Act of 1884, Ch. 49 (Code Art. 93, Sec. 138) was passed. This act, mandatory in its terms, requires the Orphans' Court, upon the passage of an account distributing chattels real, to pass an order directing a conveyance of the property to the party entitled, and the execution by the executor or administrator of a deed thereof to such person. *Woelfel v. Evans,* 74 Md. 346.

The assent of the executor or administrator, as we have seen, is a condition precedent to the passing of title. An important practical matter to be attended to in this connection, therefore, is to see that distribution of the leasehold estate is properly made in the administration account stated and passed in the Orphans' Court, because it is in this form that such consent is legally shown. Prior to the Act of 1884, already referred to, this administration had all the effect of a deed to the party entitled, and passed the legal title. Since that Act, a deed from the administrator seems to be required in addition; but the importance of correctly stating the account has not been diminished. The ordinary form of distribution is simply by the accountant's craving allowance in the account for, *e. g.*, "A certain leasehold lot of ground (describing it) delivered to A."

It is important to see that the form of words used is sufficient to make a complete distribution, conveying full title to the distributee and leaving no title outstanding in the administrator. Where distribution of the absolute estate is made, the question is not a difficult one; but where leaseholds are given or distributed to one person for life with remainder to other persons, the question is sometimes more difficult. In one case testator had left his estate to his widow for life, with power of appointment to her by will. The widow, as executrix, stated her account, in which she used this language: "Allowed said accountant for the residue of the estate retained by her as the widow of the deceased, for the purposes and subject to the conditions and provisions set forth in the will," etc. This, it was held, closed the entire estate and made a complete distribution according to the terms of the will. *Myers v. Safe Deposit & Trust Co.* 73 Md. 413, 424.

In *Woelfel v. Evans,* 74 Md. 346, on the other hand, the facts were that a surviving husband had a life interest in his wife's personalty, she having died intestate, and in his account

as her administrator there was this item: "Allowed this accountant, for the balance of said estate, retained by him as the surviving husband and tenant for life, with remainder to *his* children." This was not a complete distribution, because the children were not named and there was nothing to show that the wife had no children other than his children. Moreover, it did not indicate, to those who might desire to deal with the property, who were the real owners of it. The distribution was incomplete and did not properly pass title to the children of the wife. In like manner, a distribution to the life tenant "for life only" would leave title to the remainder undistributed in the executor. *Bank v. Hughes,* 83 Md. 355, 360; *Cf. Crean v. McMahon,* 106 Md. 507, 518.

CHAPTER VIII.

TITLE BY PURCHASE.—PATENTS—COMMON LAW CONVEYANCES.

We have now completed our consideration of the first grand division of title—Title by Descent. Title by purchase has already been defined as the title acquired by sale, or gift, or by any other method than by descent.

TITLE BY GRANT FROM THE STATE.

This, as we have already seen, was either by special legislative grant of a particular piece of land to a certain individual or corporation, or by a grant made in pursuance of a general statutory scheme for granting State lands to the individual. Congress has passed general laws providing for sale of public lands belonging to the Federal Government. These laws provide for the establishment of land offices in the Western and other States where the general government still owns large tracts of lands, and the would-be purchaser is required to make his negotiations with the registers and receivers of these offices. The purchaser enters on the records of the office a full and complete description of the land he desires to purchase, and, having paid the purchase money, he receives from the register a certificate of entry, as it is called, which entitles him to a patent, which is the formal deed of conveyance required by the general laws for the transfer of the legal title. The patent is signed by the President or one authorized to affix his signature and sealed with the seal of the United States.

In Maryland, in colonial times, individuals obtained title to land by patent from the Proprietary. After the Revolution the new State succeeded to all the rights of the Proprietary and early established a land office and system of patenting vacant and escheat lands to private individuals. (Code, Art. 54.) Any person desiring to take up such lands may obtain a warrant from the commissioner of the land office, directed to the surveyor of the county where the land lies, requiring him to survey the same and return a certificate of the survey to the land office upon payment of the sum of fifty cents per acre for each acre mentioned in such warrant. (Art. 54, Sec. 35.) The surveyor, before executing the warrant, is required to give notice of such execution to the owners and occupants of the adjacent lands. Upon the return to the land office of the certificate of survey, together with a certificate of the value of the improvements upon such land, if any, the commissioner of the land office shall finally determine the new value of such land and improvements. If the certificate of survey has been found correct, and the whole compensation or purchase money has been paid, and such certificate has laid six months in the land office and no caveat has been entered thereto, the person having such certificate returned, his assignees, devisees or heirs, shall be entitled to a patent thereon. All patents shall be signed by the Governor and have affixed thereto the great seal of the State. For further particulars, see Code, Art. 54. The effect of a patent in passing title may be questioned in a suit at law, and hence the general rule is to issue the patent where the right is doubtful. *Carswell v. Swindell,* 102 Md. 636, 640. No patent can now be issued for land covered by navigable waters. Code, Art. 54, Sec. 49; *R. R. Co. v. Baltimore,* 106 Md. 561, 565. This means that no patent can now be granted for lands below low-water mark. *Day v. Day,* 22 Md. 530, 537.

TITLE BY PRIVATE GRANT.

Title by private grant includes all modes of private alienation, all conveyances *inter vivos,* as distinguishable from title by devise. Conveyances may be divided into three principal classes, viz.:

1. COMMON LAW CONVEYANCES.
2. CONVEYANCES OPERATING UNDER THE STATUTE OF USES.
3. MODERN CONVEYANCES.

1. COMMON LAW CONVEYANCES.

The more important of the common law conveyances are as follows:

FEOFFMENT, or livery of seisin.

FINES AND RECOVERIES.

GRANT.—Grant operated only on incorporeal things and future estates, as not being capable of delivery.

LEASE.—By which a less estate than that of the grantor was created.

RELEASE.

SURRENDER.—By which a particular estate was conveyed

ASSIGNMENT.—By which leasehold interests were transferred.

EXCHANGE.

FEOFFMENT OR LIVERY OF SEISIN.

In considering the subject of estates in real property, the necessity and effect to livery of seisin as operating to effect the transfer of land is treated. This method of transfer was known as feoffment. The person making the transfer was known as the "feoffor," and the transferee as the "feoffee." The delivery was ordinarily accompanied by a "charter of feoffment" declaring the limitations of the estate or estates

vested in the feoffee, but the livery of seisin alone was necessary until the passage of the Statute of Frauds. The effect of this statute was to declare that all estates by livery of seisin only, or by parol, and not put in writing and signed by the parties so making and creating the same, or their agents thereunto lawfully authorized, should be estates at will merely. The livery of seisin was the essential thing, the charter of feoffment being merely the evidence thereof. *Carroll v. Norwood,* 5 H. & J. 155, 162. This mode of transfer was available only in the case of estates accompanied by seisin of which actual delivery of possession could be made, i. e., estates of freehold in possession, and was not available for the transfer of rights in incorporeal things, of which actual delivery of possession could not be made. For the same reason, no freehold estate *in futuro* with a present title thereto could be created. In England and in most of the states of this country, feoffments and livery of seisin have either been abolished altogether, or have become obsolete, or been simply rendered unnecessary by statute. As early as 1715, it was provided in Maryland that livery of seisin should not be necessary to the validity of any deed. Code, Art. 21, Sec. 23. *Matthews v. Ward,* 10 G. & J. 433, 448; *Riley v. Carter,* 76 Md. 581, 596. The Act of 1766, Chapter 14, providing for recording the deeds of feoffment, has the effect of making the enrollment of such deeds a substitute for the act of livery and as equivalent to it. *Rogers v. Sisters of Charity,* 97 Md. 550, 553; *Handy v. McKim,* 64 Md. 560, 569.

There was only one doctrine with relation to the conveyance by feoffment which need detain us. The conveyance by feoffment was held to pass the actual seisin in fee or for life, according to its terms, whether the feoffor had an estate in the land or not. In consequence of this doctrine, a tortious feoffment disseissed the rightful owner, and until entry by him he was as absolutely divested of his seisin as if he had made the feoff-

ment himself. And where one attempted to make a feoffment of a greater estate than he possessed, his feoffee could acquire a tortious estate, and the smaller estate which the feoffor actually possessed would be lost or merged in the tortious estate so granted. His feoffee, therefore, acquired a defeasible estate, and could be ousted at once by the rightful owner of the reversion. This doctrine does not, of course, prevail in Maryland. *Worthington v. Lee,* 61 Md. 530, 539. The operative words in a feoffment are *dedi et concessi*—"have given and granted."

FINES AND RECOVERIES.

These collusive actions are fully treated in considering the methods whereby at common law, after the passage of the Statute *De Donis Conditionalibus* estates tail were barred. Their purpose was to make possible the transfer of lands not otherwise transferable. They were used not merely to dock entails, but to enable the transfer by a married woman of land owned by her. Their use in Maryland for the purpose of docking entails was rendered unnecessary by the passage of the Act of 1782, Ch. 23; Code, Art. 21, Sec. 24. *Carroll v. Maydwell,* 3 H. & J. 292, 293. The following will serve as an illustration:

Fine.—A fictitious or collusive suit would be commenced by the intended Alienee of land against the Alienor, and this suit would then be compromised, with permission of the Court, by the Defendant making his peace with the Claimant and abandoning his defense. In this way, the estate would be aliened to the claimant. The whole transaction was then enrolled of Record and a document was drawn up, called the Foot, Chirograph or Indenture of the Fine. This operated as an assurance of Lands to the Alienee binding upon all persons, who

did not within a given time (finally fixed at five years) put in their claim. 2 Blackstone, 354. The proceeding just described was a Fine conducted under the provisions of 32 Henry VIII, Ch. 36.

GRANT.

Conveyance by *grant* at common law was used for the transfer of such interests in land as, from their nature, were incapable of transfer by feoffment. Such rights as incorporeal hereditaments, being intangible or incorporeal, could not be transferred by livery of seisin; e. g., easements in another's land. A grant always involved a deed—that is a writing under seal, since no other form of writing had, at common law, any legal effect. An important distinction between a feoffment and a grant consisted in this. As we have seen, a tortious feoffment was one which purported to convey a greater estate than the feoffor actually owned and did actually convey a tortious defeasible greater estate. A deed of grant never could create a tortious estate; it only conveys what the grantor had a right to convey and could never work a disseisin of the reversioner. *Worthington v. Lee,* 61 Md. 530, 539. The operative words in the case of a grant are the same as in the case of feoffment—*dedi et concessi*—have given and granted.

LEASE.

Is a conveyance for life, for years, or at will, by one who has a greater estate. At common law, if the estate conveyed was for life, livery of seisin was also required, but if for years or at will merely, an oral lease was sufficient.

By the Statute of Frauds, a writing was rendered necessary for the transfer of an estate for *more than three years. Union Banking Co. v. Gittings,* 45 Md. 181, 196.

And by Code, Art. 21, Sec. 1, a formal deed, duly executed, acknowledged and recorded, is required in the case of estates

for *more than seven years. Emrich v. Union Stock Yards Co.* 86 Md. 482.

Even at common law, a lease for years of an incorporeal hereditament was invalid, unless in writing and under seal, since such a thing lay in grant for all purposes, and no other method of transfer was known or recognized.

The operative words in a lease at common law were *dimisi, concessi et ad firman tradidi* (have demised, granted and farmlet.) The essential matters connected with leases are treated in the Law of Real Property.

RELEASE.

A conveyance by release is a conveyance of an estate of interest in land to one who already has possession of the lands, or a vested interest therein.

But the party in possession must have a legal interest in or title to the land; a merely equitable title is not a sufficient basis for the making of a deed of release. *Carroll v. Norwood,* 5 H. & J. 155, 162.

Its use at common law was in those cases in which the person to whom the conveyance was to be made was already in possession, so that no livery of seisin could be given unless he should first quit possession, which would have involved an idle multiplication of ceremonies. The operative words in a release were "Demised, released and forever quit-claimed," and the release was by deed—that is, by writing under seal. A release may be made by the owner of the reversion or remainder expectant upon a life estate, whether it be created by act of the parties or by act of law, such as an estate of dower or curtesy, the life estate being thereby enlarged to a fee simple or fee tail. A release may also be made by the owner of the reversion to the tenant of an estate for years or at will, but not to a tenant by sufferance.

Release thus made by a reversioner or remainderman to the

particular tenants were said to inure by way of enlargement of the estate (*enlarger l'estate.*) A mere *interesse termini*—that is, the right of a lessee who has not yet entered under his lease—does not entitle him to take a release by way of enlargement, it being necessary that the lessee should be in actual possession, or in possession by virtue of the Statute of Uses.

Secondly, a release might be made, not by way of enlargement of an estate, but by way of passing an estate (*mitter l'estate*), as when a joint tenant or coparcener releases his estate to his co-tenant.

A release was never regarded as sufficient to pass the interest of one tenant in common to another, since tenants in common have distinct seisins the one from the other.

A third mode of operation of a release is by way of extinguishment of an interest in another's land, as when the owner of a rent or easement releases his rights to the owner of the land subject thereto.

Fourthly, a release could be made at common law by one disseised of all his right or claim in favor of the disseisor, or of his heir or feoffee, this being known as a "release by way of passing the right" (*mitter le droit.*) The disseisor's right could thus be made absolute.

In Maryland today, as at the old common law, a release cannot be made to one having neither title to or possession of the land, but a conveyance purporting to be a release will generally be upheld as a conveyance by bargain and sale or grant. See *Rogers v. Sisters of Charity,* 97 Md. 550, 553; *Handy v. McKim,* 64 Md. 560, 568.

SURRENDER.

A surrender is just the converse of a release. A release is the conveyance by a reversioner or remainderman of his interest to the tenant in possession, the tenant of the particular estate.

A surrender operates to transfer a particular estate to the immediate reversioner, and is effected by the words "hath surrendered, granted and yielded up," or similar words. No particular form of words is necessary; it is sufficient that the intention appears. It is the yielding up of an estate for life or years to him that has the immediate reversion or remainder, in which the particular estate may merge or "drown," by agreement of the parties.

Surrenders may be express or implied. In this connection we are only concerned with express surrenders. The subject of implied surrenders is fully treated in the Law of Real Property.

An express surrender can take effect only where the party surrendering is in actual possession and the party to whom the surrender is made has a higher estate in immediate reversion or remainder.

A surrender, therefore, cannot be made by one who has a mere *interesse termini*, and the interest surrendered must bear such a relation, both in "quantum" and position, to the estate of the surrenderee that it may merge therein; consequently, the estate surrendered must immediately precede the estate of the surrenderee, and no vested estate must intervene and it must be no greater in quantum than the surrenderee's estate.

While at common law a surrender might be by parole, by virtue of the provisions of the third section of the Statute of Frauds, no surrender (except by operation of law) shall be valid unless in writing signed by the party surrendering, or by his agent thereto lawfully authorized by writing. This matter is, however, fully treated in the Law of Real Property.

ASSIGNMENT.

An assignment is the form of conveyance used in the transfer of chattels real—leasehold interests in land.

At common law, an assignment of a chattel interest in land, unlike an incorporeal hereditament, could be made by parole, but this same section of the Statute of Frauds requires that assignments must be in writing, signed by the assignor or by his agent duly authorized.

EXCHANGE.

Exchange of land has been defined to be "a mutual grant of equal interests, the one in consideration of the other." 2 Bl. Comm. 323.

An exchange of land can only be made by two parties in interest. If more than two parties, pursuant to an agreement between them, make conveyances to each other, it is not a technical exchange.

Each party must have a transferable title to the property given by him in exchange. Where neither party has such a title there is a total failure of consideration on both sides, and the exchange is void. Likewise, where the title attempted to be transferred by either party fails, the exchange is voidable at the election of the other party.

In Exchanges, the estates of the parties in the respective properties exchanged must be of equal dignity, as, for example, a fee for a fee, or lease for a certain term for a lease for the same term. The value of the respective properties need not be equal, but there must be no such disparity as will shock the conscience of a court of equity.

Exchange of lands is a technical form of conveyance, in which the words "exchange" must be used, and no circumlocution can operate to supply this word if it be omitted. As a result of this rule, technical exchanges of land have been almost entirely abandoned in modern conveyancing.

At common law, if both pieces of land involved lay in the same county, the exchange might be oral; but if situated in

different counties, a deed was required. By Secs. 1-3 of the Statute of Frauds, a writing is rendered necessary in case of the exchange of freeholds or of terms of years for three years or more.

No livery of seisin was necessary in the case of the common law exchange, but it was required that each party to the exchange should enter upon the land received by him in exchange, while both parties were still alive.

Likewise, deeds of release and surrender did not need to be accompanied by livery of seisin, because in the former case the releasee had the seisin already, and in the latter case the seisin of the surrender or having been acquired originally from the surrenderee is subordinate to the seisin in law of the surrenderee, his reversioner, the estates of the two together constituting one and the same seisin.

CHAPTER IX.

CONVEYANCES OPERATING UNDER THE STATUTE OF USES.

The Statute of Uses (27 Henry VIII, Ch. 10) provided, in effect, that where any person was seised of any lands to the use of any other person or persons, in every such case every such person or persons should from thenceforth stand and be seised, deemed and adjudged in lawful seisin of such lands to all intents and purposes in law, as they had the use in the same; and that the estate that was in such person seised to the use of any such other person shall be deemed to be in him that may have the use after such quality, manner, form or condition as they had before in and to the use.

The Statute of Uses at once produced important effects upon the old modes of conveying the legal estates in land, which we have just been considering. After the passage of the statute, whenever a use was declared or raised in favor of a person, the *legal estate at once passed* to such person; while prior to the passage thereof, livery of seisin had been necessary to pass a freehold estate.

Thus, if a feoffment were made to A and his heirs to the use of B for 10 years, and subject thereafter to the use of C for life and after C's death to the use of D in fee tail special, with remainder to the use of E in fee, the various estates would take effect by virtue of the statute just as if a valid conveyance of them had been made operating at common law.

The livery of seisin necessary to pass the freehold by feoffment need only to have been made to A, the feoffee to uses; the statute is then called into operation, and is powerful enough,

without anything further, to take the property from A and to vest it in the various persons mentioned, according to their specified interests.

After the passage of the Statute of Uses, therefore, it became possible to convey the legal estate without making use of any of the primary common law conveyances which operated by transmutation of possession and required a livery of seisin. The grantor had only to make a declaration of uses upon a sufficient consideration. His declaration vested the use or equitable estate in the grantee, and the statute immediately executed it into a legal estate and transferred the seisin to him. Therefore, there was no further need for the cumbersome and ceremonial feoffment and livery of seisin.

Three forms of conveyances were soon evolved in order to take advantage of this peculiar characteristic of this famous statute, viz:

COVENANT TO STAND SEISED.

BARGAIN AND SALE.

LEASE AND RELEASE.

Each of these classes of deeds itself vests in the grantee only the use or equitable estate. The legal estate and seisin are transferred to the grantee by the operation of the Statute of Uses. And when any of these deeds creates a future and contingent use, which cannot be executed by the Statute because future and contingent, the operation of the statute upon the deed will be suspended in respect to such interest until it has become vested and in a position to be executed.

COVENANT TO STAND SEISED.

This is a covenant between near relatives by blood or marriage, founded upon a *good* consideration of natural love and affection, that the covenantor, the legal proprietor of the land,

shall stand seised to the use of the covenantee. In this case the consideration of natural affection was sufficient to raise a use in favor of the covenantee, and the Statute would vest the legal title in him. *Murray v. Kerney,* 115 Md. 514, 518.

But this conveyance can only operate as a covenant to stand seised when it is made upon the consideration of love or marriage. *Cheney v. Watkins,* 1 H. & J. 527, 532.

No particular word or form of words is necessary to constitute a "covenant to stand seised." It has been said that there is no covenant which admits of such a variety of words as this covenant. The usual term employed in creating it is of course, "covenants", but any other words may be used which are tantamount to it. *Murray v. Kerney,* 115 Md. 514, 518.

The consideration of natural love and affection which, as we have seen, is the distinguishing mark of this form of deed, need not be expressed. It may sufficiently appear from the relationship of the parties. *Ibid.* p. 518.

BARGAIN AND SALE.

A bargain and sale was where the legal owner of land entered into an agreement with a purchaser for the sale to him of his interest and the purchaser paid, or promised to pay, the money for the land. The transaction would not be complete at law wthout a legal conveyance, but in equity a use was "raised" in favor of the purchaser; the bargainor was, in the view of the Chancellor, the bare legal owner, holding to the use and for the benefit of the bargainee. The effect of the statute was to vest the legal title in the bargainee. *Brown v. Reeder,* 108 Md. 653, 657.

The operative words in a Deed of Bargain and Sale are "bargained and sold." *Matthews v. Ward,* 10 G. & J. 443, 449.

A *valuable* consideration, as contra-distinguished from a merely good consideration, is necessary to support a bargain and sale, and this is true, even though the consideration is merely a nominal monetary consideration; as, for example, $5. *Brown v. Renshaw,* 57 Md. 67, 75.

This marks the distinction between a bargain and sale and a covenant to stand seised, as the latter is based upon a *good* consideration, i. e., natural love and affection. If, therefore, A bargained and sold land to B and his heirs to "his and their proper use and behoof," the legal title in fee simple would be vested in B by virtue of the statute.

If it were desired to create a trust estate for the benefit of C, the deed would read that A hath bargained and sold to B and his heirs to his and their proper use and behoof, in trust nevertheless for C, etc.

As heretofore stated, the statute exhausts its vigor in executing the first use. The second use or trust is unacted upon and is enforceable in equity only, as a trust. *Brown v. Renshaw,* 57 Md. 67, 75; *Brown v. Reeder,* 108 Md. 653, 657.

Prior to the going into effect of the Act of 1856, Ch. 154, Code, Art. 21, Secs. 11, 12, bargains and sales had nearly superseded all other modes of conveyance in Maryland. Conveyancers, always the most cautious of men, had adopted the plan of employing words in conveyances suitable for both the common law forms of conveyance and those operating under the Statute of Uses. The Courts thereupon adopted the rule of interpretation that deeds should be so construed as to give effect to the intention of the parties to the deed, provided the terms and expressions used in the grant would admit of such construction. And in construing deeds of conveyance of a freehold estate, the court should treat them either as deeds of feoffment or of bargain and sale, as will best subserve the objects and purposes in contemplation of the parties. *Handy v. McKim,* 64 Md. 560, 568.

The question as to whether or not a deed is to be construed as a feoffment or as a bargain and sale is often one of great importance Thus, a deed is made in which the operative words are as follows: A, for a money consideration, doth "give, grant, bargain and sell, alien, enfeoff, release, assign and convey" certain land unto B and his heirs in trust for the sole and separate use of C for life and after her death in trust for the use and benefit of C's legal heirs, etc. If this be construed to be a deed of bargain and sale, the use would be executed in B, the Trustee, and C would have an equitable life estate with an equitable remainder in fee to her heirs, inasmuch as the statute could only execute the first use so as to confer the legal estate upon the trustee, and the rule in Shelley's case would apply.*

If, however, the deed be construed as a feoffment, while C's life estate is an equitable estate and the use is not executed in her because the use for her benefit is an active one, the use for the benefit of her legal heirs after her death is a passive one, and will, therefore, be executed by the Statute of Uses; they will take a legal estate in the remainder. *Graham v. Whitridge,* 99 Md. 248, 292. Inasmuch as her life estate is an equitable one, the rule in Shelley's case did not apply.*

These were substantially the facts in *Ware v. Richardson,* 3 Md. 505, and *Handy v. McKim,* 64 Md. 560. The general rule is laid down that where there is a grant to A to the use of B, the policy of the law being to execute all uses and vest the legal title in the *cestui que use,* whenever it is possible, the deed will be treated as a common law conveyance, since such a limitation in a bargain and sale would create a use upon a use, which cannot be executed.

That this question is still a practical one of great importance will appear from the decision in *Rogers v. Sisters of*

*See Act 1912, Ch. 144.

Charity, 97 Md. 556, In 1882 and 1889 two deeds were made to the Sisters of Charity which, for a consideration of $10, "granted, bargained, sold, aliened, enfeoffed, released and conveyed" to them certain real estate "to have and to hold in trust for the use and benefit of St. Vincent's Female Orphan Asylum". If these were held to be deeds of bargain and sale, the Sisters of Charity would hold in trust for the St. Vincent's Orphan Asylum, as the statute could execute but one use. If held to be feoffments, as no active duties were imposed upon the trustee, then the statute at once executed the legal estate in the *cestui que trust*—the Orphan Asylum—and that corporation was immediately vested with the legal fee simple estate. These deeds were, therefore, construed to be deeds of feoffment, in order to carry out the clear intent of the parties.

LEASE AND RELEASE.

The effect of the Statute of Uses in permitting the creation of the deed of bargain and sale was to enable the legal title to be transferred without any writing or ceremony whatever and with absolute secrecy. Thus, one of the great objects of the statute — the prevention of secret conveyances — was eluded. To prevent this the Statute of Enrollments (27 Hen. VIII, Ch. 16) was passed shortly thereafter, depriving such conveyances of all effect unless made by deed enrolled within six months in one of the courts of Westminster Hall or with the *custos rotulorum* of the county in which the lands were situate. After a time, an ingenious conveyancer bethought him of the following scheme in order to avoid the necessity for enrollment. The Statute of Enrollments by its terms applied only to estates of "inheritance or freehold." If A, tenant in fee simple, bargained and sold his lands to B for 10 years, there was no necessity for any enrollment, or even for any

writing to evidence the transaction. The Statute at once operated upon the bargain and sale; one person, the bargainer, was seised to the use of another, the bargainee, and there was no necessity for enrollment, inasmuch as the bargain and sale did not purport to create an estate of inheritance or freehold. It was held that a bargain and sale for a term of years gave to the lessee by force of words of the Statute of Uses "possession" of his term as if he had actually entered on the land, so that he was capable of taking by a simple common law conveyance, without livery of seisin, a "release" of the reversion.

Thus, if A, tenant in fee simple, bargained and sold a parcel of ground to B for a year, and the next day executed a release of the reversion in fee to B and his heirs, B would by the bargain and sale have immediately vested in him an estate for a year in possession. B would therefore become capable of taking a release, and, as soon as the release was executed, the smaller estate and the larger would coalesce and the term be merged or sunk in the larger estate, whereupon B would become tenant in fee simple in possession.

This was perhaps the most effective of the conveyances under the Statutes of Uses, and in England superseded to a larger extent both the covenant to stand seised and bargain and sale deeds. This sort of conveyance was involved in the case of *Owings v. Norwood,* 2 H. & J. 96, 106, although it never became very popular in this State, since the English Statute of Enrollment, which occasioned its use in England, does not seem to be in force in this country.

In the State of Maryland, at the present time, all of the forms of conveyance which we have been considering are still valid. Fines and recoveries and exchange are probably obsolete. Feoffment may be, and still is, used, the enrollment of the deed of feoffment taking the place of the old common law livery of seisin. *Rogers v. Sisters of Charity,* 98 Md. 550, 553, and cases cited therein.

CHAPTER X.

MODERN CONVEYANCES.

In most of the other States of this country, there are statutory provisions authorizing the transfer of lands by simple forms of conveyance, which in their operation much resemble the common law Grant, except that they are not confined to incorporeal things. *Worthington v. Lee,* 61 Md. 530, 539. There is in this country a well-recognized class of conveyances known as "quit claim" deeds, which are to some extent a development of the common law release, and which have acquired their name from one of the words ordinarily used in the release. Such a conveyance purports merely to convey whatever title to the particular land the grantor may have, and its use excludes any implication that he has a good title, or any title at all. It necessarily, therefore, contains no covenant of title, and its employment is, in some States, regarded as in itself notice to the purchaser of possible defects in the title, so that he cannot claim to occupy the position of a bona fide purchaser. A quit claim, however, is sufficient in itself to pass the grantor's existing title to the same extent as a deed of grant or bargain and sale. *Spreckles v. Brown,* 212 U. S. 208. Quit claim deeds have not, as far as I know, ever been specifically recognized in Maryland, but would undoubtedly be held good to convey all the grantor's title. Code, Art. 21, Sec. 12, *Worthington v. Lee,* 61 Md. 530, 539.

The Maryland statute regulating the modern form of deeds was passed in 1856 and was Chapter 154 of the Acts of Assembly of that year. So much of it as is still in force will be found codified as Code of 1904, Art. 21, Secs. 1-69, incl. The instrument used under this Act is known simply as a "deed."

There is some doubt whether under the Maryland statute Code, Art. 21, Sec. 12, the deed using the word "grant" passes the title *directly* to the grantee. Some contend that the statute merely makes the word "grant," etc., synonymous with "bargain and sell," and that a deed, using the word "grant" as the operative word, is a deed of bargain and sale and operates under the Statute of Uses. It is also contended that the statutory form of conveyance operates as a common law feoffment. The Maryland cases which pass upon the question of the operation of deeds, whether under the statute of this State, under the Statute of Uses or as common law feoffments, invariably treat the deed as either a bargain and sale or as a common law feoffment. *Matthew v. Ward,* 10 G. & J. 443, 448; *Ware v. Richardson,* 3 Md. 505, 553; *Handy v. McKim,* 64 Md. 560, 568; *Rogers v. Sisters of Charity,* 97 Md. 550.

The question, as to whether a deed using the word "grant" operates directly under the Maryland statute, or as a bargain and sale under the Statute of Uses, is a practical one in the following case: Can an estate to commence or shift *in future* be created by a bargain and sale, where the person to take is not *in esse?* The doubt arises from the inability of such a person to furnish the consideration requisite to the validity of a bargain and sale. If, however, the deed is to a trustee for the use of the unborn person, as to A for the use of the unborn son of B, the deed could operate as a bargain and sale, if the consideration passed from A. If the Maryland statute operates directly to create such a future use, there is no need for the interposition of the trustee. The question, however, is sufficiently in doubt to make it desirable to interpose the trustee in all such cases in Maryland.

We have already seen that courts, having discovered the intention of the parties to a deed, will give effect to that intention by construing the deed as that form of conveyance

which best will carry out that intention. *Murray v. Kerney,* 115 Md. 514, 518. We have already seen the practical application of this important rule to the determination of the question as to whether a deed will be held to be a feoffment or a bargain and sale. It is applied in numerous other connections. For instance, a conveyance intended to take effect as a bargain and sale, but which is void for want of pecuniary consideration, will take effect as a covenant to stand seised, if a consideration of blood or marriage exists. *Cf. Union Bank v. Betts,* 1 H. & G. 175 as stated in *Koogle v. Cline,* 110 Md. 586, 600. A deed which would be void as a feoffment will be upheld as a covenant to stand seised, where the consideration is that of love and natural affection. *Murray v. Kerney,* 115 Md. 514, 518. Similarly, as we have already seen, a conveyance in words of release, void as such for want of possession or of an estate in the release, will be supported as a conveyance by bargain and sale or otherwise. *Carroll v. Norwood,* 5 H. & J. 155, 162; *Spreckles v. Brown,* 212 U. S. 208.

This principal has also been adopted in order to support limitations of future estates which could not be supported unless the conveyance were regarded as operating under the Statute of Uses.

FORMS AND ESSENTIALS OF DEEDS.

A deed is a writing or instrument on paper or parchment sealed and delivered. Deeds at common law could be made in two forms.

(a) Deed poll, a deed of one part or executed by one party only and not by or between two or more parties or in two or more parts. A deed poll was distinguished from an indenture by having the edge of the parchment or paper on which it was written cut even (or polled as it was anciently termed), that is in a straight line or plane without being in-

dented. This distinction, however, although once peculiar and essential, has in modern times become of comparative insignificance, in consequence of the disuse of the formality of indenting the other description of deeds presently to be treated.

A deed poll is properly made in the first person and commences with the formula of address to all mankind, so common in ancient written instruments: "Know all men by these presents, that I, etc., have given, etc.

(b) A deed indented, or indenture, is a deed executed, or purporting to be executed, in parts between two or more parties, and is distinguished by having the edge of the paper or parchment on which it was written indented or cut on the top in a particular manner. It takes its name from its being indented, or cut on the top or in the side, either by a waving line or a line of indenture *instar dentium,* so as to fit or aptly join its counterpart, from which it is supposed to have been separated.

The distinctions at common law between deeds poll and indentures were numerous and important. Thus, for example, a bargain and sale could only be in the form of an indenture, and not by deed poll. *Paca v. Forwood,* 2 H. & J. 176. If an indenture was actually required it was not sufficient to call the paper an indenture. It had actually to be indented. By the Act of 1715, Ch. 47, Sec. 4, Code, Art. 21, Sec. 23, indenting was declared to be no longer necessary to the validity of the deed. The courts gradually abandoned the nice distinctions between the rights of parties created by indenture and by deed poll. *Phelps v. Phelps,* 17 Md. 120, 133. And at the present time no substantial distinction is said to exist between the two classes of deeds.

It must be remembered, however, that a deed poll is executed only by the grantor and cannot, therefore, be in any degree considered the deed of the grantee. Questions sometimes arise as to the obligations assumed by the grantee by

his acceptance of a deed poll. It is generally held (although the contrary rule prevails in New York and New Jersey) that the acceptance of a deed poll cannot have the effect of binding the grantee as a *covenantor.* A covenant can only be made under the seal of the covenantor, and the mere acceptance of a deed poll by the grantor is no substitute for his seal. It may be safely stated, as a general rule, that mutual covenants cannot arise out of a deed poll. *Dawson v. R. R. Co.* 107 Md. 70, 86, 87; 14 L. R. A. N. S. 809. An easement therefore, which can only be granted by a deed under seal, cannot be granted by the *grantee* to the *grantor* in a deed poll, and under such circumstances the grantor acquires only a mere parol license to enjoy the easement. In this case, the Canal Company was the grantee in a deed poll to it of certain land for canal purposes, in consideration of constructing and establishing a certain basin to connect with the canal. No covenant to maintain the easement arose, nor was there any grant of the easement. *Ibid,* p. 93 and following. Where, however, a grantee accepted a deed, signed only by the grantor, of property subject to a mortgage, and the deed contains a covenant by the grantee to pay the mortgage debt, such a deed poll is held, nevertheless, to create a covenant on the part of the grantee to pay the mortgage debt. *Stokes v. Detrick,* 75 Md. 256, 261.

The requisites of a deed in Maryland are as follows:

Names of Grantor and Grantee, or Bargainor or Bargainee.

A consideration in cases where a consideration is necessary to the validity of a deed.

A description of the real estate to be conveyed sufficient to identify the same with reasonable certainty.

The interest or estate intended thereby to be conveyed.

Execution. Acknowledgment.

Recording. Code, Art. 21, Sec. 9.

CHAPTER XI.

MODERN CONVEYANCES—PROPER PARTIES.

There must be persons able to contract and to be contracted with for the purposes intended by the deed. There must first be a competent grantor. The average person is competent to make a deed. It is only the exceptional person who is not.

There are three classes of such persons:

INFANTS.
NON-COMPOTES MENTIS.
MARRIED WOMEN.

The disabilities resting upon these persons are not uniform in their extent and vary in reference to each class. In respect to some the deeds are absolutely void, while as to others they are only voidable. They must, therefore, be considered separately.

INFANTS.—NON-COMPOTES MENTIS.

The disabilities of infancy and insanity are considered as analagous. *Gillet v. Shaw,* 117 Md. 508. The deeds of both infants and insane are usually held to be voidable only and not absolutely void. *Key v. Davis,* 1 Md. 32, 42; *Chew v. Bank,* 14 Md. 299, 319.

By a person *non compos mentis* in this connection is meant one who, while a lunatic, has not been so found upon inquisition. *Flach v. Gottschalk Co.* 88 Md. 368. Where, however, an insane person has been adjudicated a lunatic upon an

inquisition and a committee has been appointed for him, his deed thereafter made is *absolutely void. Flach v. Gottschalk Co.* 88 Md. 368, 376; *Gillett v. Shaw,* 117 Md. 508; *Riley v. Carter,* 76 Md. 581, as reported in 19 L. R. A. 489, note.

If, however, the lunatic has not been so found upon inquisition and makes a deed to a person who has no knowledge of his lunacy and the consideration paid is adequate and the transaction in every respect a fair one, and the grantee cannot be placed in the position he occupied before making the deed, then the deed will be held to be *entirely valid. Flach v. Gottschalk Co.* 88 Md. 368, 373.

Likewise, generally speaking, the deed of an infant is *not void,* but *merely voidable.* In certain cases, however, the deed of an infant binds him and is valid to all intents and purposes. Generally speaking, whatever an infant is bound to do at law will be binding upon him if he does it voluntarily without suit at law. Thus, if he be a joint tenant with others, and enters voluntarily into a partition with his co-tenants which is fair and just and executes a deed in pursuance thereof, that deed will be valid and binding. *Amey v. Cockey,* 73 Md. 297, 303.

Leaving out of consideration these special cases, the deed of a lunatic or infant *is voidable* in a Court of Equity, pending the disability, by the following persons: In the case of a lunatic by his committee thereafter appointed. Upon the death of the lunatic or infant, the deed may be attacked by his heirs at law, but if possession has been held under the deed for a long time and permanent improvements have been made upon the land by a bona fide possessor, such an attack cannot be made at law, but only in equity, where compensation for such improvements can be made to the defendant in possession under such a deed. *Evans v. Horan,* 52 Md. 602, 613.

If a lunatic, not so found upon inquisition, makes a deed of trust purporting to be for the benefit of his creditors, during the lifetime of the lunatic, his creditors are entitled to proceed in equity to set the deed aside as in fraud of their rights. *Riley v. Carter,* 76 Md. 581, 597.

Upon the termination of the disability, the infant who has become adult, or the lunatic who has regained his reason, is entitled to disaffirm and have set aside his deed made while laboring under his disability, provided it did not come within the exceptions heretofore considered. The act of disaffirmation must, however, be performed promptly after the removal of the disability, and an unreasonable delay will operate as an affirmance of the deed. *Amey v. Cockey,* 73 Md. 297, 305.

As to what is a reasonable time depends upon the circumstances of each case. If the property involved is city property and requires a constant expenditure to keep it in repair and to maintain it in good habitable condition, a comparatively short time would suffice. To allow any very long time within which the disaffirmance could be made would lead either to the dilapidation of the property or to entrapping the grantee under the deed into an expenditure for improvements that might result in a total loss to him. (Ibid.) Affirmative ratification after the removal of the disability may be shown by any act indicating an intention to ratify. Such ratification when made relates back to the date of the deed and gives to the deed the same effect as though it had originally been entirely valid. *Hall v. Hall,* 21 Md. 439, 446; *Levering v. Heighe,* 2 Md. Ch. 81, Brantly's note.

MARRIED WOMEN.

The history of the power of married women to convey their property is the history of the gradual removal of restrictions upon their power to convey, until now a feme covert possesses

the same powers in that respect as are possessed by her husband.

In considering the validity of a married woman's deed, made at any particular time, it is necessary to consider the state of the law at that time. This is important, inasmuch as the acts passed by the Legislature from time to time to cure deeds, defectively executed or acknowledged, have no effect upon an invalid deed made by a married woman. *Grove v. Todd,* 41 Md. 633, 645.

Prior to the effective operation of the Act of 1894, Ch. 631, on June 1, 1904, *Baumeister v. Silver,* 98 Md. 418, 427, limitations did not run against a married woman so long as she remained covert, so that the Statute of Limitations was not a defense as against the invalidity of her deed. *Amey v. Cockey,* 73 Md. 297, 306.

By the common law, the deed of a married woman was absolutely null and void. She could only convey her estates in lands by fine or by common recovery. *Preston v. Evans,* 56 Md. 476, 490. Except as to her Sole and Separate Estate settled upon her, with power to convey as a feme sole, she could not convey until empowered to do so by statute, and then only in the manner prescribed by the statute. If the statutory mode of conveyance were not observed, the deed was void and, therefore, without any effect whatever. *Grebb v. Rose,* 40 Md. 387, 392.

The Code of 1860, Art. 45, Sec. 2-11, and the Code of 1888, Art. 45, Sec. 2-12, provided that any married woman might convey her real or personal property by a joint deed with her husband.

The Act of 1894, Ch. 326, limits this power to married women who have attained the age of 18 years.

The Act of 1898, Ch. 457, Sec. 4, provides that no conveyance, if made by her under the age of 18 years, shall be valid,

unless her husband unites therein. If this method was not followed the deed was void. *Grebb v. Rose,* 40 Md. 387, 392.

Where, since 1872, the husband was a lunatic or insane, and had been so found upon inquisition, and said finding remained unreversed and in force, she was empowered to convey her Statutory Separate Estate as fully as if she were a feme sole by her separate deed. Code, Art. 45, Sec 2; *Haddaway v. Smith,* 71 Md. 319.

This remained the law as to her Statutory Separate Estate until January 1, 1899.

SOLE AND SEPARATE ESTATE.

Where there is no specific mode of disposition prescribed or no restriction thereon, she may convey her Sole and Separate Estate as though she were a feme sole. But where property is conveyed or settled upon a feme covert to her sole and separate use, and a specific mode of alienation is provided in the instrument creating the estate, that mode *must be pursued,* as it operates as a negation of any other and is a paramount law governing or controlling the conveyance of the property. *Armstrong v. Kerens,* 61 Md. 364, 367.

By the Act of 1898, Ch. 457, Code of 1888, Art. 45, Sec. 2, requiring the joinder of the husband in the deeds of his wife, was repealed. Section 4 of this act provided that married women over 18 years of age shall hold all of their property of every description for their separate use as fully as if they were unmarried, and shall have all the power to dispose thereof by deed, mortgage, lease, will or any other instrument that husbands have to dispose of their property, and no more. If, however, the married woman is under 18 years of age, her conveyance will still be invalid unless her husband joins therein.

Where the same parties have two capacities such as trustees and executors, in one of which capacities they have power to

make a valid deed of property, although in the other capacity they may not have such power, then the fact that they may execute the deed in the capacity in which they have not such power will not render the deed void. It will be regarded, and treated, as though made in the proper capacity. *Philbin v. Thurn,* 103 Md. 342, 349, 350, and cases cited.

IF GRANTOR IS COMPETENT, THEN HE MUST HAVE ACTED VOLUNTARILY AND WITH FULL KNOWLEDGE.

But not only must the deed have been executed by a grantor competent in law so to do, but as a matter of fact the deed must be executed voluntarily and with full knowledge of its contents and of the facts, in reliance upon which it has been made. *Corrie v. Thompson,* 57 Md. 197, 200. Therefore, a deed procured by fraud, force, duress or undue influence is not binding upon the grantor, but voidable at his option. In order that he may be permitted to invoke the aid of a court of equity in having the deed set aside, he must return or tender to his grantee the consideration received by him. *Dunnington v. Hubbard,* 65 Md. 87, 92; *Frush v. Green,* 86 Md. 494.

If, however, before the defrauded grantor has exercised his right to avoid the deed, the grantee conveys the property involved to an innocent purchaser for value, who has no notice of the rights of such grantor, the latter cannot reclaim the property as against such innocent vendee. Phelps' Juridicial Equity, Sec. 241.

DEED MUST CONTAIN NAME OF THE GRANTOR.

The deed must contain the name of the grantor or grantors, or bargainor or bargainors. It will necessarily be entirely inoperative to bind the interest of one not mentioned therein

as a grantor. *Hawkins' Lessee v. Gould,* 3 H. & J. 243. This is in accordance with the great weight of authority. *Cf. Sterling v. Park* (Ga.), 58 S. E. 828; 13 L. R. A. N. S. 298.

The deed must also contain the name of the grantee or bargainee. Code, Art. 21, Sec. 9. The grantee must be a person competent to take. As to religious corporations, see *Regents v. Trustees,* 104 Md. 635, and cases cited. As to voluntary unincorporated associations, the case of *Snowden v. Crown Cork & Seal Co.* 114 Md. 650, (dissenting opinion by Pearce, J., and concurred in by Schmucker and Burke, JJ.) held that there may be a valid gift *inter vivos* of personal property to a voluntary unincorporated association auxiliary to an incorporated society. By a parity of reasoning to that adopted in the majority opinion in this case, it would appear that a deed of real estate might be validly made to such a voluntary unincorporated association. Query: can such unincorporated association validly reconvey property so conveyed to it? Since the grantee must be competent to take, a deed made to a person previously deceased is void *ab inito.* Such a grant can have no operation or efficacy in law and consequently no estate or interest can be acquired under it. *Carroll v. Norwood,* 5 H. & J. 155, 161; *Hartman v. Thompson,* 104 Md. 389, 402.

The use of both Christian name and surname in describing both the grantor and the grantee is the preferable method and ought always to be adopted. Indeed, the provisions of Code, Art. 17, Sec. 58, relating to the forwarding of abstracts of all deeds, etc., seem to require that in a deed the Christian names and surnames of the parties should appear, for it specifically requires the insertion of both Christian name and surname in the abstract. The object of names is merely to distinguish one person from another, and where such distinction is accomplished, it makes no difference if the true name of the party be not used, or indeed, if no name at all be used. *Hartman v. Thompson,* 104 Md. 389, 402.

Centuries ago, untitled persons were better known by their Christian names than in any other way; but today the surnames are the most important and controlling appellations. And when, to the surname, a circumstance is added which belongs to the individual intended to be named and to no other person, the certainty of description is complete. If the deed be to Smith, the postmaster of the city, or to Thompson, the greengrocer, or to Peterson, the tailor, there is no difficulty in recognizing the person intended. In fact, men are usually better known by their occupation than by their Christian names. Such a designation would, therefore, be sufficient. It was accordingly held that a mortgage executed to "the firm of Wehr, Hobelman & Gottlieb" contained a sufficient description of the grantees to gratify this requirement of the Code. *Bernstein v. Hobelman,* 70 Md. 29, 40, etc. It makes no difference that the grant is to a person under a fictitious name or under a trade name, just so the grantee is an actual person in existence and can be identified. *Hartman v. Thompson,* 104 Md. 389, 402. In this case, the deed was to James Moore, whose true name was Louis E. Grafflin.

A grant to "the owner or owners of a certain brick house or curtilage" *is insufficient.* The ownership of a house is a casual circumstance, which is liable to change from time to time, and does not impress upon an individual any permanent characteristic by which he may be identified. The name of the grantee must always be set forth in the deed, though not necessarily in the granting clause. *Schaidt v. Blaul,* 66 Md. 141, 144; *Bay v. Posner,* 78 Md. 42, 47.

A misnomer of a corporation will not defeat the grant provided that it can be shown what corporation was intended. See *Bernstein v. Hobelman,* 70 Md. 29, 38. Thus, in *Chilton v. Brooks,* 71 Md. 445, 449, the words "of Baltimore City" were omitted from the corporate name of the assignor of a

mortgage. The mortgage itself contained the correct corporate name and the assignment was indorsed on the back of the mortgage. The assignment was made under the seal of the corporation and over the signature of the president of the corporation, who was named in the certificate of acknowledgment as the president of the corporation making affidavit to the bona fides of the consideration. It was held to be sufficiently clear that the assignment was the act of the corporation holding the mortgage, and not of some other corporation of kindred name. The omission of the part of the corporate name was, therefore, immaterial.

"Jr." or "Sr." is no part of a man's name. Its omission would, therefore, be immaterial. *Weber v. Fickey,* 52 Md. 500, 512.

The mere omission of the middle name or initial in a person's name is immaterial and unimportant, so long as there can be no duobt as to which person is intended. *White v. McClellan,* 62 Md. 347, 352. A mistake or variation in the spelling of the name is immaterial provided that the name as actually spelled sounds, when pronounced, substantially the same as when properly spelled. Thus: "Eldred" and "Eldridge" "Penryn" and "Pennyrine" are *idem sonans* and looked upon as identical. *Mobberly v. Mobberly,* 60 Md. 376, 378. See cases collected in notes in 29 Cyc. 272-275 inclusive.

CHAPTER XII.

MODERN CONVEYANCES—CONSIDERATION.

Consideration of Cases Where a Consideration Is Necessary to the Validity of the Deed.—Code, Art. 21, Sec. 9.

At common law, a consideration was not essential to the validity of a deed. *Cunningham v. Dwyer,* 23 Md. 219, 230. In the case of conveyances operating under the Statute of Uses, as we have just seen, a consideration is necessary. At the present time, as between the parties to the deed no consideration is necessary. If from the absence of a consideration, a deed could not absolutely operate under the Statute of Uses, it would unquestionably be held valid as a common law conveyance.

Consideration May *Be* Good or Valuable.

A valuable consideration is some gain to the grantor which arises from the act or from the forbearance of the grantee. It is founded on something which is deemed valuable in a pecuniary sense, as money, goods, services and also marriage. A good consideration is the obligation upon a person raised by implication of law to provide for persons closely connected with him by blood or marriage. Deeds executed upon such a consideration, while as between the parties having all the force and effect of deeds upon a valuable consideration, are known as voluntary deeds, and, where the rights of third parties are involved, have different properties than have deeds executed upon a valuable consideration.

Parol evidence is not admissible to vary the character of the consideration. *Koogle v. Cline,* 110 Md. 587. Thus, if a deed recites a money consideration, parol evidence is not admissible to show that the true consideration was love and affection, or a gift, or services, or anything else than money. *Christopher v. Christopher,* 64 Md. 583, 585; *Lawson v. Mullinix,* 104 Md. 156, 165, 166. And *vice versa,* if the consideration is stated to be love and affection, it cannot be shown to have actually been money. *Diggs v. McCulloh,* 69 Md. 592, 608. The recital of the payment of the purchase money is only *prima facie* evidence of the fact of payment. Assumpsit may nevertheless be maintained for the unpaid purchase money. *Fry v. Talbott,* 106 Md. 43, 50, and a vendor's lien therefor still subsists. *Hooper v. Trust Co.* 81 Md. 559, 588; *Koogle v. Cline,* 110 Md. 587. But see Act 1910, Ch. 216. But while parol evidence of a "different kind" of consideration is inadmissible, evidence may be offered of the same kind of consideration, varying only in amount from that expressed. *Cunningham v. Dwyer,* 23 Md. 219, 230. This point cannot, however, be raised where all the parties in interest agree, without dissent, that the consideration was of a different character than that named in the deed. Where one or more of the parties insist that the consideration as set forth in the deed is correctly stated, then no evidence is admissible of a different kind of consideration in behalf of the other parties. *Shugars v. Shugars,* 105 Md. 336, 342, etc.

Moreover, the grantee may show that when the grantor inserted in the deed a certain monetary consideration, when none in fact had been paid, the understanding of the parties was that the consideration was not intended to be paid. To permit evidence to be adduced showing that no consideration had in fact been paid, without also permitting the grantee to show that it was agreed that none was to be paid, would

impose upon the grantee an obligation which he never intended to assume. *Koogle v. Cline,* 110 Md. 587, 606, 607, 24 L. R. A. N. S. 413.

As already stated, a consideration is not necessary to the validity of a deed, unless it be one operating under the Statute of Uses. The owner of land has the absolute right to make any disposition of his or her property that he or she may think proper, provided only that such disposition does not interfere with the existing rights of third persons. If the disposition of the property be made by a competent person, though entirely voluntary and without consideration, it is perfectly valid, except as to such third persons. *Goodwin v. White,* 50 Md. 503, 509. As between the parties to the deed, it is entirely valid. As against creditors of the grantor, such a deed may be fraudulent and void. Without reference to the actual intent of the debtor, the legal effect of a voluntary transfer of property made by a party then in debt is that *prima facie* such transfer is in fraud of creditors. *Goodman v. Wineland,* 61 Md. 449, 451; *Hearn v. Purnell,* 110 Md. 458, 467. Where sufficient property remains in the hands of the grantor to pay the claims of his existing creditors, such a voluntary conveyance is valid as against such creditors. *Christopher v. Christopher,* 64 Md. 583, 588.

The burden of so proving is upon those seeking to uphold the gift. *Goodman v. Wineland,* 61 Md. 449, 451. If, however, the grantor has not sufficient property left with which to pay his then existing creditors such a conveyance will be regarded as in fraud of their rights and will be avoided in equity upon application by such creditors. Code, Art. 16, Sec. 46.

By virtue of the provisions of Statute of 13 Elizabeth, Chapter 5, in force in this State, all alienations of land made to hinder, delay or defraud creditors or others, of their claims against the grantor are declared to be utterly void. In order

that a deed may be valid as against creditors, existing or subsequent, it must be upon a valuable consideration and bona fide. If not made in good faith it is void, although the grantee may have paid full consideration. *Cooke v. Cooke,* 43 Md. 522, 531.

The Statute of 27 Eliz. Ch. 4, likewise in force in Maryland, provides that all alienations of land made with intent to defraud and deceive subsequent purchasers for valuable consideration, shall as against such person and persons claiming under them, be void, unless the alienation be for valuable consideration and bona fide.

In England, this statute was construed as invalidating any conveyance not made on a valuable consideration, as against one to whom the grantor subsequently conveyed the land on a valuable consideration, even though the subsequent alienee had notice of the previous conveyance, the execution of the subsequent conveyance being regarded as evidence that the first conveyance was fraudulent. The effect of this construction was that a conveyance of land not based on a valuable consideration could always be revoked by the grantor by means of a subsequent conveyance by him for value, unless the first grantee had conveyed the land to a purchaser for value.

By the American construction of this statute, adopted in this State, a subsequent sale without notice, after the execution of the voluntary conveyance, is only presumptive evidence of fraud, which throws the burden of proof that the voluntary deed was made bona fide upon the grantee therein and those claiming under him. But where there has been notice to the subsequent purchaser, no such presumption of fraud arises, and such notice need not be actual, but may be constructive, and notice furnished by the recording of the voluntary deed under the registry laws of this State is sufficient, in the absence of actual fraud. *Cooke v. Kell,* 13 Md. 469, 491, etc.

Though a conveyance is otherwise voidable as being in fraud of creditors, it will not be so treated in case the grantee was a purchaser for value without notice of the fraud. The provisions of the Statute of Elizabeth expressly save the rights of such a grantee. *Waters v. Riggin,* 19 Md. 536, 554; *Totten v. Brady,* 54 Md. 170, 173. The protection afforded to a bona fide purchaser for value is also extended to one who is not the grantee in the fraudulent conveyance, but a purchaser from the grantee; and this, although the conveyance could have been avoided as against the original grantee, owing to his knowledge of the fraud, or because he did not pay a valuable consideration. 2 Tiffany on Real Property, p. 1113.

At common law, an antecedent debt was a sufficient consideration to validate a deed even as against other creditors of the grantor, and even though the grantor was insolvent. It was in every sense a valuable consideration. Such a deed, would, it is true, constitute a preference to the creditor-grantee, but at common law preferences were valid. Indeed, even now an antecedent debt will be a sufficient consideration, unless the grantor be proceeded against in bankruptcy or in insolvency within the statutory period. *Castelberg v. Wheeler,* 68 Md. 266, 275; Code, Art. 47; *Bank v. Kearns,* 100 Md. 202; *Thompson v. Williams,* 100 Md. 105; Bankruptcy Act of 1898.

CHAPTER XIII.

MODERN CONVEYANCES—GRANTING CLAUSE—INTEREST INTENDED TO BE CONVEYED.

Code, Art. 21, Sec. 9, the provisions whereof we have been following, does not expressly require a granting clause, but the presence of such a clause is necessarily required by the use of the words "all deeds conveying real estate," etc.

The conveyance must contain words sufficient to express the intention of the grantor to convey the estate. *Bldg. Assn. v. Hamill,* 55 Md. 313, 317.

We have already discussed the form of operative words required in the various common law conveyances, and the conveyances under the Statute of Uses. In the case of the modern Maryland deed, it is provided that the use of the word "grant," or the phrase "bargain and sell" or of any other words purporting to transfer the whole estate of the grantor, shall be construed to pass to the grantee the whole interest and estate of the grantor in the lands therein mentioned, unless there be limitations or reservations showing by implication or otherwise a different intent. For illustrations of such contrary intent see *Kelly v. Hill,* 76 Md. x, 25 Atl. Rep. 919; *Link v. McNabb,* 111 Md. 641, 647, 648. The deed must describe the interest or estate intended thereby to be conveyed. Code, Art. 2, Sec. 9.

At common law, in order to Create or Convey an Estate in Fee Simple to a natural person by a deed, it was absolutely essential to use the word "Heirs." No other expression, however, general or far-reaching, it was held, would take the place of this magic and potent word. *Hoffsass v. Mann,* 74 Md.

400, 406. The use of the words "in Fee Simple," "forever," "all my Estate," would not supply the place of the word "Heirs." In all these cases only a Life Estate would be held to have passed. *Handy v. McKim,* 64 Md. 560. This rule also prevailed in the creation of an easement in land, whether by grant or reservation by covenants. In the absence of the word "Heirs," a mere life estate in the easement passed. *Dawson v. R. R. Co.* 107 Md. 70, 92; 14 L. R. A. N. S. 809; *Sexaner v. Wilson,* (Ia.) 14 L. R. A. N. S. 185 note, as to necessity of use of word "assigns" in order to make covenant as to a thing not *in esse* run with the land.

But where one to whom lands have been properly granted in Fee Simple does, after reciting the grant or without any recital, grant the lands to another as fully as they were granted to him, the Fee Simple will pass, without any limitation in express terms, to the heirs of the second grantee. The fee passes by reason of the words of direct and immediate reference to the deed in which the proper formula was used. Again, for the same reason, the following Limitations in Fee are held sufficient: If a man grants two acres to A and B, to hold one acre to A and his heirs, and the other to B in form aforesaid, that is sufficient; or where a man, seised of Land in Fee, enfeoffs another in Fee and continues in possession of the Lands, claiming to hold them at the will of the Feoffee, and the Feoffee enfeoffs the person by whom he was enfeoffed in these terms: "You have given me these lands; as fully as you have given them to me, I assure them to you"—that is also sufficient. Thus the omission of the word "heirs" may be cured by reference to some other deed containing that word. *Evans v. Brady,* 79 Md. 142. And accordingly in this case it was held that one to whom an Estate in Fee had been validly granted, would validly grant a Fee Simple Title to another by conveying to him all the Estate, Right, Title, Interest, Term of Years Yet to Come, Property, Claim and Demand, both at law and in

equity, of the Grantor of, in, unto and out of the land in question, inasmuch as the latter deed contained a reference for Title to the former deed in which the word "Heirs" was used.

COMMON LAW EXCEPTIONS TO USE OF WORD "HEIRS."

There were three exceptions to this old Common Law Rule:

(1) In a conveyance to a Corporation Aggregate, a Fee Simple Title will be held to be conveyed whether the word "Successors" is used or is not used. "Successors," in the case of a corporation, is the equivalent of "Heirs," in the case of a Natural Person. *Fleming v. McCurtain,* 215 U. S. 556; 54 L. Ed. 16, 17. At one time an absolute Fee Simple was not thus granted to a Corporation. It was held that, in the event of the dissolution of the Corporation at a time when it still retained Title to the property, the property at once reverted to the Grantor; but that the conveyance thereof by the Corporation during its existence would operate to convey a Fee Simple Title to the Grantee. As it was expressed in the old books, a "Corporation could be seised in Fee for the purpose of conveyance thereof, but not for the purpose of holding the same." This old rule of the Common Law has long since been abrogated, and now, upon its dissolution, the proceeds of the Real Estate of a Corporation, after the payment of its debts, would be distributed among its stockholders, so that now a Corporation may hold in Fee Simple in every respect as freely as can a natural person.

(2) Where a conveyance was made to a Trustee without the word "Heirs," the Trustee would, nevertheless, be held to have acquired a Fee Simple Title, if so to hold would be necessary for the purposes of the Trust. Thus, in *Hawkins v. Chapman,* 36 Md. 83, a conveyance had been made to H, of all the Right, Title and Interest of the Grantors in certain property, with power of sale, upon certain Trusts. It was contended that, as the deed contained no words of Limitations or Inheritance, all that the Trustee took was the Legal Life Estate. It was

held that, as the purposes of the Trust required that the Trustee should take a Fee Simple Title, it would be held that he had acquired a Fee Simple Title by the deed.

But this strict technical rule requiring the presence of the word "Heirs" in order to accomplish the creation or effect the grant of a Fee Simple Estate applied only in cases of conveyances *inter vivos*. In the case of Wills, even at Common Law, this potent word was not indispensable to the Devise of a Fee, but any words showing an intention on the part of the testator owning a fee to dispose of his whole interest in the Thing Devised, operated to transfer the Fee. *Timanus v. Dugan*, 46 Md. 402, 418, 419.

Thus, even at the strict Comon Law, Devises to a man "Forever," or to one "and his Assigns Forever," or to one "in Fee" or "in Fee Simple," have been held to transfer Fee Simple Estates, although the word "Heirs" nowhere appeared. But in every case it is necessary that the Will should exhibit the Testator's intention to confer a Fee.

(3) In the case of a Grant of Land by the Legislature, it was not necessary to use the word "Heirs" to create a Fee Simple. Any language sufficiently indicating the Legislative Intent to create a Fee Simple was held sufficient. *Fleming v. McCurtain*, 215 U. S. 56; 54 L. Ed. 16, 17.

STATUTORY CHANGES IN THE ABOVE COMMON LAW RULES.

These rules of the Common Law have been changed in Maryland by Statute, and since March 8, 1856 (Act 1856, Ch. 154; Code, Art, 21, Secs. 11 and 12), no words of inheritance (Heirs) are necessary in a Deed to Create an Estate in Fee Simple, but every conveyance of Real Estate is construed to pass the Grantor's entire Estate, unless a contrary intention shall appear by express terms or necessary implication.

Backus v. Presbyterian Assn. 77 Md. 50, 59. A grant to A, without words of limitation, followed by a limitation to a life estate in the *habendum* indicates such contrary intention. *Kelly v. Hill,* 76 Md. x, 25 Atl. Rep. 919.

This Act was never intended to apply to reservations of privileges or the granting of an easement, and in such cases, the old common law rule requiring the use of the word "heirs" still prevails. *Ross v. McGee,* 98 Md. 389, 394. Similarly in the case of rights created by a covenant. *R. R. Co. v. Silver,* 110 Md. 510, 517.

The quantum of the estate to be conveyed is generally determined by the language of the granting clause already considered and of the *habendum* clause, usually beginning with the words "To Have."

The words "and to hold" are usually added, although they now have no real meaning. They are a survival of the old *tenendum* clause at common law, which is still kept in the deed by custom. The tenendum never qualified the estate conveyed; it indicated the tenure by which the estate granted was to be holden, viz.: *tenendum per servitum militare, in burgagio, in libero socago, etc. Catholic Cemetery v. Manning,* 72 Md. 120, 126; *Marshall v. Safe Deposit Co.* 101 Md. 1, 13.

It will be sufficient if the interest or estate to be conveyed is designated in the granting clause.

The Habendum is not necessary to the validity of a modern Maryland deed, none of the forms prescribed by the Conveyancing Act, Code, Art. 21, Secs. 51-62, containing an Habendum clause. Sec. 63 provides that any covenant, limitation, restriction or proviso allowed by law may be added, annexed to or introduced with the statutory forms. Sec. 64 makes sufficient any forms conforming to the rules laid down in Art. 21 or to the rules of law.

Although not required, the Habendum is usually to be found in all forms of deeds. Its purpose is said to be to limit and define the estate which the grantee is to have in the property granted, such as whether for life, in fee and the like. It defines the extent of the ownership, but this, as we have already seen, can be sufficiently done in the granting clause.

Where the estates created by the granting clause and the Habendum are equivalent or identical, no question can arise; but in that event the Habendum, so far as any legal effect is concerned, could just as well have been omitted. The difficulty arises in those cases in which the estate created in the granting clause and that provided for in the Habendum are different or repugnant or inconsistent. What estate is then actually conveyed by the deed? In such case the granting clause will prevail, because the general rule in the interpretation of deeds is that, where there are two inconsistent clauses, the first in order shall prevail. *Pritchett v. Jackson,* 103 Md. 696, 698; *Carl-Lee v. Ellsberry,* 83 Ark. 209; 12 L. R. A. N. S. 956, note; *Callaway v. Forest Park Co.* 113 Md. 17; *Marden v. Leimbach,* 115 Md. 206, 209. Contra in case of wills. *Manning v. Thurston,* 59 Md. 218, 226; *Boyce v. Kelso Home,* 107 Md. 190, 195.

Thus, in the granting clause, an estate in fee simple is granted to A; in the Habendum a life estate only is granted. The Habendum will be held to be void and a fee simple estate will pass. *Winter v. Gorsuch,* 61 Md. 180, 186; *Culbreth v. Smith,* 69 Md. 450, 459; *Pritchett v. Jackson,* 103 Md. 696, 698; *Kilpatrick v. Balto.* 81 Md. 179, 192; *Link v. McNabb,* 111 Md. 641, 647; *Marden v. Leimbach,* 115 Md. 206, 209.

If, however, the Habendum is not totally repugnant to, or inconsistent with the granting clause, but serves merely to restrict or qualify the estate previously granted, it will not be held to be absolutely void, but merely to modify the estate. *Catholic Cemetery v. Manning,* 72 Md. 120, 126. Such re-

pugnancy between the two clauses as will serve to render the Habendum totally inoperative will exist only where the effect of the Habendum would be to divest the estate passing by the granting clause and substitute some other estate therefor. In all other cases where inconsistent, the Habendum clause is held merely to restrict or modify the estate created by the granting clause. *Marden v. Leimbach,* 115 Md. 206, 209.

In *Hopper v. Smyser,* 90 Md. 363, 383-5, "A" conveyed property in fee to "B" in the granting clause. The Habendum stated the property to be in fee, but subject to a mortgage to "C." There was a covenant of special warranty in the deed by "A" to "B." It was argued, in effect, that the Habendum was repugnant to the granting clause and inoperative, and that "A," therefore, warranted an unencumbered fee simple title to "B." But in this case the Habendum did not cut down the fee of the granting clause. It merely charged the fee with the mortgage; no change was worked in the quality or character of the estate conveyed. The estate was simply modified, restricted or limited to this extent. *Kelly v. Hill,* 76 Md. x, 25 Atl. Rep. 919. Granting clause: to "A" without words of limitation; habendum: to "A" for life. It was held that there was no repugnance. Habendum merely shows intent to limit the estate, undefined in premises, to a life estate. Similarly, where the owner in fee simple conveyed the land by deed to be held by the grantee "for all the terms of years yet to come and unexpired therein, subject to the payment of the annual rental of 53 dollars," it was held that the use of this language appropriate and usual in assignments of leasehold, rebutted the statutory presumption of an intent to convey the grantor's whole interest and only a leasehold interest will pass. *Link v. McNabb,* 111 Md. 641, 648. Nor, on the other hand, can subsequent broader expressions contained in the Habendum clause enlarge the granting words or bring within their scope property not therein described. *Marshall v. Safe Deposit Co.* 101 Md. 1, 13.

The most usual instances of an Habendum limiting and defining the estate conveyed in the granting clause is in case of deeds of trust, when the granting clause conveys a fee simple estate and the Habendum limits this estate by setting forth the trusts and purposes upon and for which the grantee is to hold the same. See, for example, *Second Universalist Society v. Dugan,* 65 Md. 460, 471.

Similarly, it is held that the estate conveyed in the granting clause cannot be controlled or limited by a covenant. If the granting clause conveys less than a fee simple, the estate conveyed cannot be enlarged by a covenant of further assurance of a fee simple title. *Weller v. Pollitt,* 104 Md. 172, 174; *Second Universalist Society v. Dugan,* 65 Md. 460, 471, 472.

The rule that where there are two contradictory or repugnant clauses in a deed, the first clause shall prevail over the latter, has no application to a contradiction or repugnancy between two parts of the same clause. Thus, in one case, in the granting clause, all the estate of the grantors was conveyed and the granting clause then went on to say: "It being understood that the interest herein conveyed is the two-thirds of the above described land." Such a deed only conveys a two-thirds interest. *Zittle v. Weller,* 63 Md. 190, 196, etc. This is also true of the inconsistency in the lease in the case of *Needy v. Middlekauf,* 102 Md. 181, 184.

CHAPTER XIV.

MODERN CONVEYANCES—DESCRIPTION OF PROPERTY, AND A DESCRIPTION OF THE REAL ESTATE. SUFFICIENT TO IDENTIFY THE SAME WITH REASONABLE CERTAINTY.

It is perfectly well settled, both upon reason and authority that every deed of conveyance, in order to transfer title, must either in terms, or by reference or other designation, give such description of the subject matter intended to be conveyed as will be sufficient to identify the same with reasonable certainty. *Berry v. Derwart,* 55 Md. 66, 72.

The description must be of such a character as to afford the means of locating the land. *Neel v. Hughes,* 10 G. & J. 8, 10. The want of a description of the subject-matter, so as to show upon the face of the instrument what it is in particular, or of a reference to something else which will render it certain, is a defect which makes the deed wholly inoperative. *Blessing v. House,* 3 G. & J. 290, 307. See *Ontario Land Co. v. Yordy,* 212 U. S. 152.

A conveyance is presumed to be made with reference to the state or condition of the premises at the time, and, if the description is sufficient when made, no subsequent change in condition can invalidate it. The property intended to be conveyed may be designated by the descriptive name of the tract by which it is generally known or well known, or by the name which it has acquired by reputation. *Huddleson v. Reynolds,* 8 Gill, 332; *Cadwalader v. Price,* 111 Md. 310, 315. Again, the land conveyed may be described as bounded by natural or

artificial objects, or as adjoining lands of certain persons or near a certain place. When the line of an adjoining tract of land is used as a call, the tract, the line whereof is so used, may be designated in the deed by any form of expression definitely indicating its identity, such as the name by which it is commonly known or the name of its owner or of its former owner, or by stating the place upon the public records where a deed conveying it may be found. *Hill v. McConnell,* 106 Md. 574, 579. The land conveyed may be described as being all of the grantor's property, etc. *Roberts v. Roberts,* 102 Md. 131, 153; 1 L. R. A. N. S. 788.

Thus, in *Roberts v. Roberts, supra,* the description in the deed was "all and singular the real and personal estate, wheresoever situate, and all other property of every nature, kind and description and wheresoever situate, of us, the said grantors." The Court said: "It is difficult to understand how it would be possible to identify the property intended to be conveyed more thoroughly than is done by that description. The intention manifested on the face of the deed was to convey and assign all of their property of every nature, kind and description. If they had undertaken to specify it, some might have been omitted, and to show on the face of the deed that they intended to make an assignment of all property it would have been necessary to have added some such clause as the one that was inserted. *Lewis v. Kinniard,* 104 Md. 653, 658; *Cooke v. Councilman,* 109 Md. 636.

If there be a reference in the deed to another deed which contains a description establishing the certainty of the description, that will suffice. *Phelps v. Phelps,* 17 Md. 120, 134. *Cf. Cochrane v. Harris,* D. R. Oct. 5, 1912.

A full and complete description of the land to be conveyed gives monuments, courses, distances and the quantity of land conveyed.

A monument for the purpose of description may consist of any object or mark on the land, whether natural or artificial,

which may serve to identify the location of a line constituting a part of the boundary of the land being described. The monument may be either a permanent natural object, such as a river, lake, ledge of rocks or tree, or it may be an artificial object, such as a highway, wall, ditch or post. Frequently, the corners or lines are described by reference to adjoining land, or to some adjoining structure which, in its legal signification, includes the land under it, such as a house or mill or other structure.

A monument may even consist of an object or point not existent or fixed at the time of the conveyance, but which is intended to be thereafter erected or fixed, and when this is done the call therefor will be of the same effect as if the monument had existed at the time of the conveyance.

A course is the direction in which a line runs, stated with reference not to terminus, but with reference to the cardinal points of the compass. 2 Tiffany Real Property, Sec. 390, as e. g., S. 40°, W. 60′.

A boundary line whose commencement is given, must be continued in the same direction, if possible. Where a line is described as running from one point to another, a straight line is presumed to have been intended, unless a different line is described in the instrument. *Hammond v. Ridgely,* 5 H. & J. 245, 275.

Where boundaries called for in the deed can be established, the courses and distances are to be disregarded and the lines are to be run to the boundaries according to the calls. *Rogers v. Raborg,* 2 G. & J. 54, 63. It is a well-settled rule of construction in regard to location that calls, metes and bounds in the description of property to be granted, are to control, if they be established, and the courses and distances disregarded if they do not correspond with the calls. *Heck v. Remka,* 47 Md. 68, 75; *Whitridge v. M. & C. C.* 103 Md. 412, 413; *Hill v. McConnell,* 106 Md. 574, 578; *Stewart v. May,* 111 Md.

162, 174; *Spreckles v. Brown,* 212 U. S. 208. As to fixing the point of beginning, see *Yost v. Moog,* 104 Md. 92. This is a question for the jury, unless there is no legally sufficient evidence.

A lot was described as beginning at a given point on the south side of Baltimore street and running thence west 19 feet 6 inches to a brick house, etc. It was held that this line could not be extended beyond the face of the east wall of the brick house, notwithstanding that the 19 feet 6 inches called for in the deed would take it beyond that point. *Moore v. Rayner,* 58 Md. 411, 419.

Where, however, the calls cannot be found, then the courses and distances must prevail. *Wood v. Ramsay,* 71 Md. 9, 19; *Hill v. McConnell,* 106 Md. 574, 578, 579. Thus, if a lot is described as binding on Lanvale street 94 feet to the center of a road, if the center of the road can be located that will be the end of that line regardless of its length; if, however, the center of the road cannot be located, then the line will end 94 feet from its beginning. A call to a lot (owner unknown) is so vague and uncertain as to be incapable of definite ascertainment and will, therefore, yield to the courses and distances. *Hill v. McConnell, supra.*

As to the meaning of "more or less" following distances in descriptions, see *Jones v. Plater,* 2 Gill, 125, Brantly's note; *Cohen v. Numsen,* 104 Md. 676, 681.

Where, from the description of the tract given, it is uncertain to which of the two tracts it actually applies, but the quantity of land mentioned as being conveyed corresponds to the quantity in one tract but not in the other, that tract will be held to have been intended the quantity whereof is correctly given. While quantity is the least certain element of descriptions of lands, yet, in the absence of some more definite description, it may be controlling. Quantity, although less reliable and last resorted to of all descriptions of boundaries.

may, nevertheless, in doubtful cases, have weight as a circumstance in aid of other calls, and where definite description is wanting it will be given controlling effect. *O'Brien v. Clark,* 104 Md. 30, 34.

If there should be any variance between the courses, distances and measurements contained in the deed and those set forth upon a plat or map referred to in the deed, the latter will govern. *Balto. v. Bouldin,* 23 Md. 375; *Dulany v. U. Rwys. & Elec. Co.* 104 Md. 423, 437; *Burk v. Balto.* 77 Md. 469, 471.

Where general words of description in a deed are followed by a special clause the latter will restrain and limit the operation of the general words. *Zittle v. Weiler,* 63 Md. 190, 196, etc.; *Cochran v. Harris,* D. R. Oct. 5, 1912.

Thus, a lease was made of "the north side of a building." These words standing alone would undoubtedly be sufficient to include the entire north side of the building. But the lease went on to say, "consisting of a store-room and fire-rooms on the second and third floors of the same, together with access to the same through hallway and porch." There was a bathroom on the north side of the building near the rear wall which could be reached by the other tenants of the building by way of a porch accessible from the hallway on the second floor. It was held that the use of the above restricted words prevented the lessee from having an exclusive right to the bathroom, although situated in the north side of the building, and that the other tenants in the building were entitled to use it jointly. *Needy v. Middlekauf,* 102 Md. 181, 184.

BINDING ON WATER.

A grant or conveyance of land bounded by a *non-navigable* stream carries with it the bed of the stream to its center, *ad filum medium aquæ,* as it was said, unless a contrary intention

is manifest from the grant or conveyance itself. *R. R. Co. v. Balto.* 106 Md. 561; *Browne v. Kennedy,* 5 H. & J. 195, 208.

Where, however, the line is described as running "down" or "with the stream," or as binding on the south or some other bank of the stream, then the water's edge will constitute the boundary, which will follow the meanders of the stream and will not be run in a straight line. *Smallwood v. Hatton,* 4 Md. Ch. 95, 100; *Budd v. Brooke,* 3 Gill, 198.

Where the boundary is on or along a *navigable* stream, the title extends only to high-water mark, all the land below high-water mark being a part of the *jus publicum. R. R. Co. v. Balto.* 106 Md. 561. "Navigable" in this connection in Maryland means "tidal," the old common law meaning.

At common law, the only method whereby a private individual could become the owner of land under navigable waters was by an express grant from the State. *R. R. Co. v. Smith,* 97 Md. 177, 180.

The owner of land abutting upon navigable waters is given by Statute the exclusive right to any accretions to his land or any improvements extended into the stream, but no such improvements shall be so erected as to interfere with the navigation of the stream. And since 1862, no patent can be issued by the State granting lands covered by navigable waters. Code 1888, Art. 54, Secs. 44-46.

By virtue of these provisions, the riparian owner is now protected from the loss of his exclusive right to extend his improvements into the stream and to accretions by the issue of a patent by the State, but until he does make such improvements or until such accretions actually are made, he has no interest in the land under the water on which his land borders, unless, of course, some right therein is conferred upon him by statute. *R. R. Co. v. Baltimore,* 106 Md. 561, 567. It is well settled that the same rules of construction will be applied to the boundaries of a municipality bordering on navigable or

non-navigable waters, as will be applied to a description in a grant to an individual for land so situated. *Ibid.* p. 563.

The word "shore" as used in conveyancing, when applied to tidal waters, both in the common and civil laws, means the space between high and low-water marks. *Dredging Co. v. Smoot,* 108 Md. 54, 60; similarly "sea-beach." *Spreckles v. Brown,* 212 U. S. 208.

BINDING ON HIGHWAYS.

When a grantor conveys a lot of ground binding on a highway, the bed of which he owns, the question arises as to whether the grantee takes title to the middle of the road, subject to the easement of the use of the road by the public, or whether he takes only to the side of the road. This question is said to be one of intention on the part of the grantor. The presumption at common law was that a conveyance of land binding on a highway carries title to the center of the road. But this presumption is a rebuttable one, rebuttable by the use of language in the description and by surrounding circumstances showing the intent of the grantor to reserve title to the roadbed in himself. If such language be used or such circumstances be shown, no part of the roadbed will pass. *Gump v. Sibley,* 79 Md. 165, 168.

Let us see how this intention of the grantor is to be ascertained. As a matter of fact, as the Court of Appeals points out in *Hunt v. Brown,* 75 Md. 481, 485, in nine cases out of ten there is no real intention either on the part of the grantor or the grantee, because the roadbed itself is a highway, dedicated or condemned for public travel, and the probability of its being closed or discontinued as such is so remote that the fee in the bed of the road is seldom, if ever, considered by the parties to the grant.

The common law rule of construction in such cases in Maryland was that where, in the description, the land was bounded

by, on or along a highway, and the grantor owned the bed of the highway, the grant will carry with it the title to the center; but that bounding land *by the side or by the margin, or by the line,* of a highway, or using expressions equivalent thereto, indicates the intention of excluding any part of the road. This statement represents the result of the Maryland cases.

Illustrations:

In *Hunt v. Brown,* 75 Md. 481, 483, the description called for a *stone planted on* the south side of a road and thence along said road. The grantor owned the roadbed, but it was held that this language excluded the possibility of any intention to include any part thereof.

In *Peabody Heights Co. v. Sadtler,* 63 Md. 533, the lot was described as beginning at a certain stone on the southwest side of a road, and running from said stone along and with said road to another stone on the southeast side of another road. This description excluded both roadbeds, and moreover the amount of land declared to have been conveyed was fully made up without including the roadbeds. The clear intention to exclude the roadbeds was held thus to have been established.

In *R. R. Co. v. Gould,* 67 Md. 60, the lot was described as beginning at a certain point, and running to the corner formed by the intersection of Winder and Henry streets, thence northerly "binding on the west side of Henry street," etc. The presumption of an intention to convey to the middle of Henry street was thus rebutted. On the other hand, where a lot was conveyed as "bounding on an alley," the presumption to convey to the middle thereof was not rebutted and title to one-half thereof passed. *Gump v. Sibley,* 79 Md. 165, 167-68.

Finally, in *Rieman v. R. R. Co.* 81 Md. 68, 75-79, the lot was described as beginning at the southeast corner or intersection of Howard and German streets and bounding on Howard street. It was held that in the absence of any clear intention to the contrary, it must be assumed that both ends

of this line are either on the center or on the side line of Howard street. As one of the lines was on the side line of the street, the other end would be held to be on that side, and none of the bed of the road passed.

The Court of Appeals, in *Hunt v. Brown,* 75 Md. 481, 485, had recognized the unwisdom of leaving the question of the title to roadbeds dependent upon the unexpressed intention of grantors in regard to a matter as to which usually no thought had been given, so that this intention had to be gathered solely from circumstantial evidence.

They accordingly recommended the passage of a legislative enactment providing that all grants thereafter made of land bordering on a highway should carry the fee to the middle of the highway, where the grantor was the owner of the fee, unless the fee should have been reserved *in express terms* to the grantor. The Act of 1892, ch. 684, was passed in accordance with this recommendation, *Rieman v. R. R. Co.* 81 Md. 68, 79, and that is now the law of the State of Maryland as to all conveyances thereafter made. *Tel. & Tel. Co. v. Ruth,* 106 Md. 644, 654; 14 L. R. A. N. S. 358. In this case a call running southerly on the east side of a private alley was held, under this act, to carry to the center of the alley. The rule is thus the same in the case of a private as of a public road. *Dineen v. Convention,* 114 Md. 589, 596.

Where the owner of a tract of land causes it to be platted into lots and streets, and lays out a street on the margin of the tract wholly on his own land, and the next adjoining unplatted land belonging to another, his conveyance of lots bounding on such street will carry the fee in the entire street opposite his lot. It is not to be presumed that he intended to retain an interest in any portion of the street fronting the lots so conveyed. 5 Cyc. 911.

PAROL EVIDENCE ORDINARILY NOT ADMISSIBLE TO EXPLAIN DEEDS.

The deed must speak for itself, and its provisions cannot be aided, modified or explained by extrinsic evidence. *Jones v. Syer,* 52 Md. 211, 216. But in case of doubt, the courts take into consideration the language employed, the subject-matter and the surrounding circumstances. *Brown v. Reeder,* 108 Md. 653, 657. So where, therefore, there is manifestly an error on the face of the description, the deed will not on that account be held invalid. Wherever possible, the court will give the description that construction which will meet the facts of the case and carry out the intention of the parties.

The court will inquire into the probabilities of mistake as to objects of courses called for, and look to the consequences which would result from adopting one or the other interpretation. Thus, if calls or expressions are inconsistent, that call or that expression will be adopted which will best fit the facts of the case, and that call or expression which cannot be reconciled with the rest of the description will be disregarded.

Where, for example, a line is called to run "northwesterly parallel with Preston street," and Preston street itself runs northeasterly and southwesterly, that is a manifest error; "northeasterly" will be read instead of "northwesterly." Where sense requires it, "north" will be read "south." *Md. Construction Co. v. Kuper,* 90 Md. 529, 544-548.

In *Newbold v. Condon,* 104 Md. 100, 105, the court quoted from the earlier cases the doctrine that in order to make clear the calls or more nearly harmonize the quantity of land with that called for in the grant, the calls may be reversed and the lines run in opposite directions. It then read the length of a line of the description of a certain tract as 19½ perches, instead of 10½ perches, as it really was, inasmuch as the actual possession harmonized with a line of that length, and reversed

the calls and courses, making them run in opposite directions, and making the first line in the description as written the last line and so on. As a consequence of this interpretation, a lot of the proper size (10 acres) was gotten which corresponded with the actual possession of the lot agreed to be conveyed.

This case is also authority for the well-established doctrine that an erroneous description in a later deed will be corrected by a reference to an earlier deed containing a correct description. Where the deed contains a correct description and an erroneous reference to title, the latter will be disregarded. *Bay v. Posner,* 78 Md. 42, 43; and see *Scarlet v. Montell,* 95 Md. 148, 159.

In the construction of deeds, they must be taken most strongly against the grantor and in favor of the grantee, but this rule is only to be resorted to when the words of the deed are doubtful in their meaning or susceptible of more than one construction. *Carroll v. Granite Mfg. Co.* 11 Md. 399, 411; *Zittle v. Weller,* 63 Md. 190, 196.

In accordance with this doctrine, it is held that where the deed contains two descriptions of the land to be conveyed, the one by name and the other by metes and bounds, or courses and distances, the grant will operate to pass the land according to that description which is most beneficial to the grantee. *Winter v. White,* 70 Md. 305, 311. It would be advisable in this connection that the street number of a parcel of city property, where it had before been described by such number, as 312 West Lombard street, should also be inserted in the deed, as well as the metes and bounds, etc. Thus, in *Lewis v. Kinniard,* 104 Md. 653, 658, the lot was described by the number of the house erected upon it, and as there could be no dispute as to the actual location of the house, there was no difficulty in identifying the property.

CONFLICTING DESCRIPTIONS.

Sometimes it happens that the descriptions in conveyances of adjoining lots overlap—that is to say, embrace the same

land. The question then arises as to which of these conflicting conveyances will prevail. Where a grantor owning a tract of land conveys it away in several parcels, the description of which conflict, full effect will be given to the deed first made. *Bryan v. Harvey,* 18 Md. 113, 128, etc. Similarly, a senior patent from the State prevails over a junior patent, and the lines of an elder survey over those of a junior, where they interfere. *Dorsey v. Hammond,* 1 H. & J. 190. Again, the more definite or certain description will prevail over a more uncertain one, as e. g., a frontage of "forty-six feet" over one of "forty-one feet, more or less," or "about forty-one feet." *Long v. Ragan,* 94 Md. 462, 465. Where a tract of land is sub-divided and is subsequently found to contain either more or less than the aggregate amount called for in the surveys of the tracts within it, the proper course is to apportion the excess or deficiency among the several tracts. But if a tract is divided into certain number of lots of uniform size, and an irregular surplus is also divided into two or more lots, any deficiency will fall upon the latter lots. 5 Cyc. 973, 974.

APPURTENANCES.

An easement will pass on a conveyance of the land to which it pertains—that is, the dominant tenement, even though there is no reference to the specific easement, or any statement that all the "appurtenances or privileges" belonging to the land shall pass therewith. *Barry v. Edlavitch,* 84 Md. 95, 116.

The word "appurtenance" is properly confined to things of an incorporeal character such as easements, and a conveyance of the land "together with the appurtenances and advantages thereunto belonging or in any manner appertaining" will not pass other land than that described, on the theory that it is appurtenant thereto, or as the rule is frequently expressed, "land cannot be appurtenant to land." 2 Tiffany, Real Prop-

erty, Sec. 293, *Moss v. Chappell,* 126 Ga. 196; 11 L. R. A. N. S. 398, 407.

Sometimes, however, "appurtenances" is held not to be used in its technical sense as just defined. Thus, it is held sometimes to mean chattels, as fixtures attached to the land, or to mean land "usually occupied" with the principal land granted. *Thomas v. Owen,* 20 Q. B. D. 225, 231. This secondary meaning is not, however, the usual or ordinary meaning of "appurtenances," "appurtenant" or "appertaining."

CHAPTER XV.

MODERN CONVEYANCES—COVENANTS.

The subject of covenants is fully treated in Real Property in treating of Leasehold Estates. In former times, the covenants used were rather numerous, the more usual and important being:

THE COVENANT OF GENERAL WARRANTY.
THE COVENANT OF SPECIAL WARRANTY.
THE COVENANT OF SEISIN IN THE GRANTOR.
THE COVENANT THAT THE GRANTOR HAS THE RIGHT TO CONVEY.
THE COVENANT OF QUIET ENJOYMENT.
THE COVENANT AGAINST ENCUMBRANCES.
THE COVENANT OF FURTHER ASSURANCE.

The forms of these covenants as formerly used, were long and verbose. In the case of all of them—of the covenant of general warranty, of special warranty, of seisin, that the grantor has a right to convey, of quiet enjoyment, against encumbrances and of further assurance, the forms have been greatly shortened and simplified by the provisions of the Act of 1864, Ch. 252, Sec. 189. These sections, Code, Art. 21, Secs. 69-77 will be found to contain the old forms, as well as the new simplified forms that replace the old forms.

THE COVENANT OF GENERAL WARRANTY.

The Covenant of General Warranty, meaning that the grantor, his heirs, devisees and personal representatives will forever warrant the property conveyed to the grantee, his heirs, devisees and assigns, against the claims of all persons whomsoever, Code, Art. 21, Sec. 70, is very unusual in Maryland, although common in some States, as West Virginia.

This is the broadest covenant known to the law. Its modern form is "that he will warrant generally the property hereby conveyed." The obligation in a general warranty of title is not that the covenantor is the true owner, or that he is seised in fee, with the right to convey, but that he will defend and protect the covenantee against the rightful claims of all persons thereafter asserted. This includes a warranty even as against the State.

THE COVENANT OF SPECIAL WARRANTY.

The Covenant of Special Warranty is a form of covenant usually found in deeds in this State. Its effect is that the grantor, his heirs, devisees and personal representatives will forever warrant the property unto the grantee, his heirs, devisees, personal representatives and assigns, against the claims and demands of the grantor, and all persons claiming by, through or under him. All this is embraced in the simplified form "that he (the grantor) will warrant specially the property hereby conveyed." Code, Art. 21, Sec. 71. This covenant does not render the covenantor answerable for any losses which might occur from the assertion of a title superior to that of the covenantor. That is the effect of a covenant of general warranty. *Gittings v. Worthington,* 67 Md. 139, 149, 150. Such a covenant refers only to the existing right or interest granted, and does not estop the covenantor from claiming the same premises against his own covenantee or grantee by or under a title acquired subsequent to the making of his own deed.

Covenants of title run with the land and inure to the protection of the owner for the time being of the estate which they are intended to assure and are enforceable not only by the covenantee and his representatives, but by his heirs, devisees and alienees. *Crisfield v. Storr,* 36 Md. 129, 148.

THE COVENANT OF SEISIN IN THE GRANTOR.

The Covenant of Seisin in the Grantor, that he has *good title* and of *quiet enjoyment,* while still perfectly valid and proper, are now but rarely used. Their form, meaning and effect are sufficiently set forth in Code, Art. 21, Secs. 72, 73, 74. 2 Tiffany, Real Property, Secs. 395, 396, 398.

THE COVENANT AGAINST ENCUMBRANCES.

The Covenant against Encumbrances is still frequently used. It has for its object security against those rights to or interest in the property conveyed, which subsist in third persons to the diminution in value of the estate, though consistent with the passing of the fee in the estate. This covenant usually does not run with the land, but is only for the benefit of the covenantee. Its shortened form now reads "that he (the grantor) has done no act to encumber the land," but this is the full equivalent of the older form "that he had not done or executed or knowingly suffered any act, deed or thing whereby the land or premises conveyed, or intended so to be, or any part thereof, are or will be charged, affected or encumbered in title, estate or otherwise." Code, Art. 21, Sec. 74. Even though the grantee has knowledge of the existence of encumbrances at the time of delivery of the deed to him containing a covenant against encumbrances, he is still entitled to the full benefit of the covenant. He is not bound to insist upon the removal of the encumbrances prior to the acceptance of the title, even though the contract of sale bound the vendor to convey a title, free of encumbrances. He may prefer to accept the encumbered title and rely on his action *in personam* against the grantor. *Bryant v. Wilson,* 71 Md. 440, 442, 443.

THE COVENANT OF FURTHER ASSURANCE.

The Covenant of Further Assurance appears invariably in all deeds except those executed by fiduciaries. It now reads

"that he (the grantor) will execute such further assurances of said land as may be requisite," and this has the same effect as the old form, "that he (the grantor) his heirs or personal representatives, will at any time, upon any reasonable request, at the charge of the grantee, his heirs or assigns, do, execute or cause to be done and executed all such further acts, deeds and things, for the better, more perfectly and absolutely conveying and assuring the land and premises hereby conveyed or intended so to be, unto the grantee, his heirs and his assigns in manner aforesaid, as by the grantee, his heirs and his assigns or his or their counsel, learned in the law, shall be reasonably devised, advised or required." Code, Art. 21, Sec. 76.

The Covenant of Further Assurance relates both to the title of the vendor and to the instrument of conveyance to the vendee, and operates as well to secure the performance of all acts necessary for supplying any defect in the former as to remove all objections to the deficiency and security of the latter. Under this covenant, the covenantor may be required to do such further acts as may be necessary on his part to perfect the title which the conveyance purports to pass, but the covenantee cannot demand that he do acts which are unnecessary, *Gwynn v. Thomas,* 2 G. & J. 420, 428, etc. or which it is impossible for the covenantor to do. The remedy under this covenant is more often by a suit for specific performance than by an action of damages, as in the case of other covenants. 2 Tiffany, Real Property, Sec. 399. The decree for specific performance passed in enforcement of such a covenant will require the vendor to convey the title he covenanted to convey, even if to do so he is compelled to convey a title acquired by him after his conveyance, although he actually purchased such title for a valuable consideration. *Cochran v. Pascault,* 54 Md. 1, 16.

REAL AND PERSONAL COVENANTS.

Certain covenants are real covenants and are said to run with the land, that is to say, pass to the assignee of the party for whose benefit the covenants have been made, and can be enforced by such assignee. On the other hand, certain other covenants are looked upon merely as collateral to the land, as the personal covenant of the covenantor, and do not bind the assignees of the covenantor although they be expressly included by the use of the word "assigns."

Covenants to run with the land so as to bind assignees thereof, must extend to the land so that the thing required to be done will affect the quality, value or mode of enjoying the estate conveyed, and thus constitute conditions annexed or appurtenant to it. There must also be a privity of estate between the contracting parties at the time of the making of the covenant, and the covenant must be consistent with the estate to which it adheres and of such a character that the estate will not be charged or defeated by a performance of it. *Glenn v. Canby,* 24 Md. 127, 130; *Whalen v. R. R. Co.* 108 Md. 11, 19; 17 L. R. A. N. S. 130; *Hollander v. Cent. Metal & Supply Co.* 109 Md. 131, 155; *R. R. Co. v. Silver,* 110 Md. 510. Such a covenant must have entered into the original consideration upon which the conveyance with which it is connected was made. *Goldberg v. Feldman,* 108 Md. 330.

Thus, covenants for good title run with the land, inure to the protection of the owner for the time being of the estate they are intended to secure, and may be enforced by the covenantee, his representatives, heirs, devisees and alienees. *Crisfield v. Storr,* 36 Md. 129, 148. Covenants by a railroad company to construct and maintain a siding on the covenantee's land and to take up and set down at said siding, by the passenger cars of said company, all persons going to and from the farm of the covenantee, are covenants running with the land

and inure to the benefit of the assignees of the covenantee, *Whalen v. R. R. Co. supra,* p. 20.

Similarly, covenants for quiet enjoyment, to insure, to repair, to pay rent &c., are real covenants running with the land. Thus, the assignee of the recorded mortgage where the assignment has been recorded, holds the legal title and is liable upon the covenant to pay rent, which runs with the land. *Lester v. Hardesty,* 29 Md. 50, 54; but if the mortgage was paid and a release executed, though not recorded, that would operate as an extinguishment of the legal title. *Horner v. Chaisty,* 101 Md. 593, 596; and the assignee of *mortgaged leasehold property* is liable on the covenants in the mortgage to pay the ground rent and taxes thereon as such covenants likewise run with the land. *Build. Asso. v. Robinson,* 90 Md. 615, 620. The assignee of the leasehold interest is personally liable upon all covenants that run with the land and for any breaches of such covenants the lessor may sue the assignee during the continuance of the assignment. As the assignee's liability, in the absence of express agreement, arises wholly from his relation to the land, when he severs that relation he puts an end to his liability for any future breaches thereof. *Reid v. Weissner Brew. Co.* 88 Md. 234, 236; *Nickle v. Brown,* 75 Md. 172, 184, &c.

Upon similar principles, it has recently been held that a covenant by the lessor of land for the redemption of land by the lessee is a covenant running with the land, even though it might be argued, under the language used in *Glenn v. Canby,* 24 Md. 127, 130, that the performancce of the covenant would defeat the estate of the lessor and change the character of the estate of the lessee. It was held, however, that the right of the lessee to redeem is similar in nature to the right of the lessee to purchase which has always been held to be a right incident to the lessee's estate and passing therewith. *Maughlin v. Perry,* 35 Md. 352, 357; *Hollander v. Central Metal and*

Supply Co. 109 Md. 131. Covenants in leases for the renewal of the term thereof or for an additional term are clearly covenants running with the land. *Ibid.*

The second class of covenants consists of those which are regarded as merely collateral to the land, as the personal covenant of the covenantor and, therefore, as not binding upon his assignees. Thus, where A had borrowed money from B, to be expended in erecting houses on certain land, and executed to B a mortgage on the land by which he covenanted for himself, his representatives and assigns, to pay the mortgage debt, and the mortgage expressly declared that this covenant should run with the land, it was, nevertheless, held that this was a personal and not a real covenant. And this is so because it neither related to, nor affected the quality, or value of the land, and the performance of it by the payment of the mortgage indebtedness would, at once, divest the covenantees of all their interest in it. Such a covenant does not bind the assignees of the mortgaged property. *Glenn v. Canby,* 24 Md. 127.

Similarly, where a covenant conferred upon a mining company owning certain mines, and its lessees, the benefit of having its coal carried at certain rates, it was held that such a covenant does not run with the land and does not extend to the grantees of the mining company. *Coal Co. v. R. R. Co.* 41 Md. 43. A covenant by a railroad company to leave at the siding to be unloaded, any car in which any articles weighing at least 3,000 pounds should be laden for the covenantor, on which the cost of transportation has been paid, is a personal covenant, and does not run with the land. *Whalen v. R. R. Co.* 108 Md. 11, 20; 17 L. R. A. N. S. 130. A comparison of the covenants in this case which are declared to be real and running with the land, and this last covenant which was held to be a personal covenant and not binding upon the assignees of the covenantor or in favor of the assignees of the covenantee, will show how shadowy is often the line be-

tween these two classes of covenants. See *Sexaner v. Wilson,* (Ia.), 14 L. R. A. N. S. 185; *Bull v. Beiseker,* (N. D.), 14 L. R. A. N. S. 514. Nevertheless, a restrictive covenant as to the use of the land imposed by the lessor, although not technically running with the land, will be enforced in equity against all persons taking an assignment of the land with notice of such covenant. *Newbold v. Peabody Heights Co.* 70 Md. 493, 501; *Dawson v. R. R. Co.* 107 Md. 70, 88, 89, and cases cited.

A covenant as to a thing not *in esse* does not run with the land unless expressly made with the covenantee and his assigns. *Dawson v. R. R. Co. supra,* p. 87; *Lynn v. Mt. Savage Co.* 34 Md. 603, 634, adopting the first and second Resolutions in the celebrated *Spencer's Case,* 5 Coke, 16. *Sexaner v. Wilson,* (Ia.), 14 L. R. A. N. S. 185, note; *R. R. Co. v. Silver,* 110 Md. 510.

CHAPTER XVI.

MODERN CONVEYANCES—EXECUTION.

"Every deed conveying real estate shall be signed and sealed by the grantor or bargainor, and attested by at least one witness." Code, Art. 21, Sec. 10. There are thus three parts of the execution:—SIGNING; SEALING, and ATTESTATION.

SIGNING.

When the grantor or bargainor cannot write or sign his name, the usual procedure is for him to make his mark in the space left for that purpose, either with the pen in his own hand, or by holding or touching it, when the mark is made by another by his direction and assent. The mark so made appears on the original instrument, and is recorded with and as an essential part of it, just as is the signature of one who has written his name in full. *Evans v. Horan,* 52 Md. 602, 608; *Goldberg v. Novickow,* 113 Md. 29.

SEALING.

At common law, a deed by its very definition was required to be sealed by the grantor. A deed was a sealed instrument. A deed which was not sealed, did not convey the legal title, although it might be sufficient to establish an equitable claim to the property. *Colvin v. Warford,* 20 Md. 357, 395, 396. The same rule was impliedly laid down in the case of a mortgage not under seal in the case of *Sandars v. McDonald,* 63 Md. 503, 511.

Where, however, the instrument was actually sealed at the time of its execution and recordation, the fact that the seal

subsequently became detached and lost cannot impair the validity of the instrument. *Van Riswick v. Goodhue,* 50 Md. 57, 62. But the deed must actually have been sealed. The mere intent to affix the seal or the impression of the grantor that he has affixed seal, cannot make the instrument a deed, when in point of fact it is not a deed. (*State v. Humbird,* 54 Md. 327, 330).

At common law, an instrument was sealed usually, at least, by impressing some device upon wax, which was made to adhere to the paper. At the present time, even in those jurisdictions in which the old common law in this respect still prevails, an impression made by stamping upon the paper on which the instrument is written, or even a paper wafer, or piece of paper gummed on the face of the instrument, is usually regarded as sufficient. 2 Tiffany, Real Property, Sec. 403. From the earliest period in Maryland, a scrawl has been used as a seal. It is not necessary that the scrawl must be adopted by the grantor, by a declaration in the body of the deed to make it his seal. It is sufficient if the scrawl be affixed to the deed at or before the time of its execution and delivery. For, if the grantor execute and deliver the deed with the scrawl attached, as the scrawl in this State is considered as equivalent to the wax or wafer, it is as much the grantor's seal as if he had declared it to be so in the body of the deed. The question always is, Is this the seal of the grantor? If he has delivered the deeds with the scrawl attached, it is his seal and must be so considered. *Trasher v. Everhart,* 3 G. & J. 234, 236. In practice, however, nearly every deed concludes: "In testimony whereof, the grantor has set his hand and seal," or some similar expression, whereby the grantor specifically adopts the seal.

The omission of the seal is, therefore, even today a matter of practical importance. If omitted, no legal title passes, but merely an equitable title. If the mortgagor does not seal the mortgage, no decree *in personam* can be made against the

mortgagor for the balance of the mortgage debt, inasmuch as the right to such a decree only exists where the mortgagee would be entitled to maintain an action at law upon the covenants contained in the mortgage for the residue of the mortgage debt. *McDonald v. Build. Asso.* 60 Md. 589, 592.

In Maryland, church corporations have frequently been incorporated under some such collective name as "Trustees of such and such a church." Such corporations are now empowered to adopt a corporate seal. Still, if they do not do so, the persons who are such trustees are still empowered to sign their names as Trustees to a deed and to place opposite to them the old common law scroll, and this, if done, will operate as a sufficient sealing of the deed by the corporation. *Phillips v. Insley,* 113 Md. 341, 348.

ATTESTATION.

The attestation, strictly speaking, is not a part of the execution of the deed, because it is the act of a third party, having no other relation to the deed than that of a mere witness to its execution. The execution consists of the acts of the party making the deed, and who is to be affected by it. *Carrico v. Bank,* 33 Md. 235, 245.

In some States, two witnesses are necessary in order to make a conveyance valid as between the parties thereto. By the Maryland Statute, at least one witness seems to be required. The witness need not be present at the actual signing of the instrument by the grantor, provided the latter acknowledged to him that it is his act, and expressly or implicitly requests him to attest the instrument. The witness must sign the instrument usually under the words "Signed, sealed and delivered in the presence of," "Test," "Attest" or "Witness."

Attestation is prescribed rather for the purpose of preserving the evidence than for constituting the essence of the deed. It is not essential to the validity of a deed, unless made so by

statute, that it should be executed in the presence of witnesses. *Carrico v. Bank,* 33 Md. 235, 245.

While Code, Art. 21, Sec. 10, requires attestation by at least one witness, there is no statute which in terms declares a deed invalid without such attestation, and, therefore, a deed though unattested, will be regarded as entirely valid as against the grantor and purchasers with notice; and if such a deed has been duly acknowledged and recorded as required by law, it will have the same effect as respects its giving constructive notice, as if the attestation had not been wanting. *Brydon v. Campbell,* 40 Md. 331. 337.

The forms prescribed by the Code, Article 21, for mortgages Sections 59-61, assignment of mortgage Section 32, release of mortgage Section 34, lease Section 62 and release of vendor's lien, Act 1906, Chapter 65, Section 28A, do not require a witness thereto, and, therefore, any of these instruments unattested will be held valid to all intents and purposes. *Carrico v. Bank,* 33 Md. 235, 244, etc.

CHAPTER XVII.

MODERN CONVEYANCES—ACKNOWLEDGMENT.

"No deed of real property shall be valid for the purpose of passing titles unless acknowledged and recorded as herein directed." Code, Art. 21, Sec. 15. No estate of inheritance or freehold, or any declaration or limitation of use, or any estate above seven years, shall pass or take effect unless the deed conveying the same shall be executed, acknowledged and recorded as herein provided." Code, Art. 21, Sec. 1.

Acknowledgment is a proceeding provided by statute whereby a person who has executed an instrument may, by going before a competent officer or court and declaring it to be his act and deed, entitle it to be recorded. The acknowledgment itself is the act of the grantor in acknowledging before a duly qualified person the instrument to be his act and deed. In common parlance, the certificate by the officer of the fact of the acknowledgment is regarded as the acknowledgment, and, indeed, we find judicial definitions of the acknowledgment of a deed as including both the act of acknowledgment by the grantor and the written evidence thereof made by the officer. It is the acknowledgment before a competent officer that entitles a paper to go on record, so that, when recorded, it may operate as constructive notice to all the world. *Brydon v. Campbell,* 40 Md. 331, 337.

The form of certificate of acknowledgment is prescribed by statute in three cases in Secs. 65-67 of Art. 21; the first being the form to be used where the acknowledgment is by a person *sui juris* made within this State; the second, when made by husband and wife, and the third, when made out of this State.

Any form of acknowledgment containing in substance these prescribed forms will be sufficient. Code, Art. 21, Sec. 68. Every reasonable intendment will be made to support the certificate of acknowledgment. Matters of form will not be insisted on, unless they were evidently required by the legislative authority. Any form that will reasonably and substantially gratify the requirement of the statute will be held sufficient. *Basshor v. Stewart,* 54 Md. 376, 381, 383.

In *Wickes v. Caulk,* 5 H. & J. 36, 37, 42, the deed was dated the 6th of October, 1707; the acknowledgment was certified to have been made on the 6th of October, but omitted to state the year, and the deed was recorded on the 8th of January, 1707. There by inference and intendment, the time of recording was made to correct the date of the deed and to supply the particular year in the certificate of acknowledgment.

In *Kelly v. Rosenstock,* 45 Md. 389, the mortgage bore date the 6th of August, 1872, but the particular day of the month of August 1872, upon which the acknowledgment was made was omitted to be stated. The court held that by looking to the date of the mortgage and the clerk's certificate indorsed thereon of the time when it was filed for record, the particular day of the month when the acknowledgment was made was with certainty supplied. *Bldg. Asso. v. Lusby,* 116 Md. 173, 177.

In *Bldg. Asso. v. Brace,* 51 Md. 508, the certificate stated that the attorney of the corporation appeared and acknowledged the mortgage to be his act and deed, instead of the act and deed of the corporation; but the court held that the acknowledgment was aided by intendment, and that it should be read and understood as the acknowledgment of the corporation by its attorney, according to what was the manifest intention.

In *Basshor v. Stewart,* 54 Md. 376, the certificate of acknowledgment stated that "the attorney for the corporation grantor

appeared to be the act and deed of the corporation," omitting the words "and acknowledged the said deed." It was held to be a fair presumption that when the attorney appeared before the magistrate as certified, he did the only thing that he was authorized to do—that is, he acknowledged the deed to be the act of the corporation.

If, however, there should be any reasonable doubt as to the meaning and real import of the certificate, it will be held to be invalid. Thus, an acknowledgment of a deed purporting to be made by ——— Murray, without other designation of the person making the acknowledgment, is ineffectual to convey title to land. *Hiss v. McCabe,* 45 Md. 77, 84. Grammatical errors and obvious mistakes will be disregarded. *Hughes v. Wright,* (Tex.), 11 L. R. A. N. S. 643 and note.

In order that a certificate of acknowledgment may be valid it should contain by virtue of the provisions of Code, Art. 21, Sec. 8—

The name of the person making the acknowledgment.

The official style of the officer taking the acknowledgment. See *Stanhope v. Dodge,* 52 Md. 483, 493.

Time when taken.

A statement that the grantor acknowledged the deed to be his act, or made an acknowledgment similar in substance.

Corporations acknowledge deeds by attorney appointed by the corporation under the seal thereof, and such appointment may be embodied in the deed. Code, Art. 23, Sec. 1. The attorney appointed in the deed should acknowledge the deed to be the deed of the corporation, not his own deed; but an error in this respect will not be fatal if the whole instrument shows that the deed, in fact, is the deed of the corporation, and not that of the attorney. *Build. Asso. v. Brace,* 51 Md. 508, 510. By the provisions of the new corporation law, Act. 1908, Ch. 740, Code, Art. 23, Sec. 74, the deed of a corporation may now

also be acknowledged by its President or Vice-President, without the apointment of an attorney.

WHAT OFFICERS MAY TAKE ACKNOWLEDGMENTS.

Before discussing the officers qualified to take acknowledgment at the present time, it is important to consider a moment the state of the law in this regard in the past, because the validity of a deed executed at any particular time will depend upon whether it was acknowledged in accordance with the provisions of the law then existing.

From 1715 to 1856, acknowledgments were required to be made before two justices of the peace; since 1856, one justice of the peace has been sufficient. Act 1856, Ch. 154, Sec. 83.

Prior to the going into effect of the Act of 1890, Ch. 232, on March 31, 1890, notaries public had no authority to take acknowledgments in this State of conveyances of land situate in this State. Since March 31, 1890, they may do so.

Prior to 1856, acknowledgments by a married woman were required to be accompanied by ceremonies, including her separate examination apart from her husband and her affirmation that she made the conveyance freely and voluntarily and without duress on his part.

The present law is to be found in Code 1888, Art. 21, Secs. 2-5, as amended by the Act of 1890, Ch. 232, and the Act of 1892, Ch. 4.

If acknowledged in the county or city within which the real estate or any part of it lies, the acknowledgment may be made before:

A justice of the peace for such county or city.
A judge of the Orphans' Court of such county or city.
A judge of the Circuit Court for the county.
A judge of the Supreme Bench of Baltimore City.
A notary public.

Any notary public of this State, regardless of the city or county for which he may have been appointed, may take such acknowledgments in any other city or county of this State. Act 1906, Ch. 398.

A justice of the peace cannot, however, take an acknowledgment outside of the county or city for which he is appointed, and if he essays to do so the acknowledgment will be as inoperative and void as if the person taking it was wholly without official character. *Grove v. Todd,* 41 Md. 633, 664.

If acknowledged within the State, but out of the county or city wherein the real estate or any part of it lies, the acknowledgment may be made before:

Any notary public.

Any judge of the Circuit Court for the circuit in which the grantor may be.

Any judge of the Orphans' Court of the county in which the grantor may be.

Any judge of the Supreme Bench of Baltimore City or any judge of the Orphans' Court of said city.

Any justice of the peace for the city or county where the grantor may be at the time of the acknowledgment, the official character of the justice being certified to by the Clerk of the Circuit or the Superior Court under his official seal. If the certificate of the Clerk as to the official character of the justice be omitted, the deed is not to be regarded as having been acknowledged at all. This certificate, like the magistrate's certificate of acknowledgment, must be attached to the instrument and recorded with it. *Sittler v. McComas,* 66 Md. 135, 139.

If acknowledged without this State, but within the United States, the acknowledgment may be made before:

A notary public.

A judge of any court of the United States.

A judge of any court of any State or Territory having a seal.

A commissioner of this State to take acknowledgment of deeds.

If acknowledged without the United States, the acknowledgment may be made before:

Any minister, consul-general, consul, deputy consul, vice-consul, consular agent or consular officer of the United States.

A notary public.

A commissioner of this State to take acknowledgment of deeds.

By Code, Art. 18, Sec. 5, it is provided that any acknowledgment made before a commissioner appointed under that article in the manner directed by the laws of this State and certified to under his seal, and indorsed on or annexed to the instrument of writing, shall have the same effect as if the same had been made or taken before a judge of a court of record of another State.

To every certificate of acknowledgment taken without this State before the judge of any court having a seal, the seal of such court shall be affixed. Code, Art. 21, Sec. 7.

Every officer before whom any acknowledgment shall be made, shall give a certificate thereof and indorse on or annex to the deed such certificate, and the certificate shall be recorded with the deed. Code, Art. 21, Sec. 6.

Justices of the peace cannot be required to prepare the acknowledgment of deeds. Code, Art. 52, Sec. 72.

A certificate of acknowledgment is *prima facie* proof of the facts it contains, if within the officer's range, but is open to rebuttal between the parties by proof of gross concurrent mistake or fraud. In favor of purchasers for valuable consideration without notice, it is conclusive as to all matters which it is the duty of the acknowledging officer to certify, if he has jurisdiction. As to all other persons it is open to dispute. *Davis v. Hamblin,* 51 Md. 525, 539.

See Ford v Ford 25 apk where Justice Shepard has coolly appropriated this language as his own

The officer taking the acknowledgment and certifying therein

will not be permitted to deny the truth of any statement to which he has so certified. *Bank v. Copeland,* 18 Md. 305, 318; *Nicholson v. Snyder,* 97 Md. 415, 424. But such an officer may testify as to facts which do not contradict his official certificates, though such facts may incidentally operate on the legal effect of the instrument acknowledged before them. For instance, he may testify as to the age and health of the grantor, to the payment or non-payment of the consideration money, to the reading or omission of the parties to read the instrument, or other collateral facts not conflicting with what they had certified. *Highberger v. Stiffler,* 21 Md. 338, 351; see *Baltimore City v. State,* 105 Md. 1, 10; *Russell v. Carman,* 114 Md. 25, 35.

CURATIVE ACTS.

Starting apparently about 1858, at almost every session of the General Assembly, general acts have been passed for the purpose of validating deeds, mortgages and other forms of conveyances, defective in the acknowledgment or in the certificate thereof, or when the official character of the officer taking the acknowledgment has not been certified as required by law, or when the conveyance has not been witnessed and sealed. The last of these was the Act of 1912, Ch, 85. Prior to the adoption of the provision of the Constitution forbidding the passage of special acts to validate defective conveyances, Constitution, Art. 3, Sec. 33, it was the practice to pass special laws validating particular conveyances.

These acts vary considerably in the language used and in the extent and nature of the defects undertaken to be corrected. Their general effect, however, is to confer upon instruments defectively executed in the particulars above specified, since the year 1858, the same validity to all intents and purposes as if the conveyances had been acknowledged, certified to and witnessed according to law, with a proviso that the interest

of *bona fide* purchasers or creditors without notice, who may have become such prior to the passage of the particular act, is not to be affected thereby. Such legislation is constitutional on the theory that it does not operate on the deed or contract by changing it, but upon the mode of proof only. But it cannot act in such a manner as to divest vested rights. *Bldg. Asso. v. Lusby,* 116 Md. 173, and cases cited. And so, as we have already seen, such legislation cannot operate to validate a void deed made by a married woman. *Grove v. Todd,* 41 Md. 633, 641.

Where the rights of third persons and creditors are not involved, such curative acts make completely valid, as between the parties, a deed in which, in the certificate of acknowledgment, both the day and month of the acknowledgment are omitted (the year being given), and which was recorded long after the expiration of the six months' period. *Bldg. Asso. v. Lusby,* 116 Md. 173.

The words "duly recorded" found in some of the curative acts e. g., Acts 1908, Ch. 105, as descriptive of the class of instruments entitled to the benefit of these acts, do not apply only to deeds recorded within the six months' period prescribed by statute. Such a construction would strip these acts of all meaning. These words were only intended to declare that the deed defectively acknowledged must be recorded to give it the designed validity, and not that a deed lawfully registered under the old law was valid. The latter had this validity without any aid from this act. *Ibid.* p. 173.

These acts, moreover, are effective and valuable in those cases where, although the conveyance is defective, the defect is a mere informality, not affecting anybody's substantial rights. *Madigan v. Bldg Assn.* 73 Md. 317, 321.

This matter will be more fully treated in treatises upon Constitutional Law. *Downs v. Blount,* 95 C. C. A. 289, 31 L. R. A. N. S. 1076, note.

CHAPTER XVIII.

MODERN CONVEYANCES—DELIVERY.

It is a general rule that it is essential to the validity of a deed that there should be a delivery of the instrument. *Hearn v. Purnell,* 110 Md. 458, 465; *Gorsuch v. Rutledge,* 70 Md. 272, 277. Delivery is the grantor's expression, either by word or by act, of his intention that the conveyance shall take effect as a transfer of title. *Dunnington v. Hubbard,* 65 Md. 87, 91. No title will pass under a deed until it has been delivered to the grantee or to some other person for him, and has been accepted by the grantee or some person duly authorized to do so for him. "The grantor must part with the possession of the deed, or with the right to retain it." *Younge v. Guilbeau,* 3 Wall, 636, 641, 18 L. Ed. 263; cited in *Leppoc v. Bank,* 32 Md. 136, 145; *Hearn v. Purnell, supra; Renehan v. McAvoy,* 116 Md. 356, 359. No particular mode of delivery is prescribed by law. *Bayne v. State,* 62 Md. 100, 114. It may be actual or verbal. *Hartman v. Thompson,* 104 Md. 389, 408.

To constitute a delivery of a deed, however, the grantor must do some act putting it beyond his power to revoke. There can be no delivery so long as the deed is within his control and subject to his authority, or he retains the right to reclaim it. *Renehan v. McAvoy,* 116 Md. 356, 359. The delivery need not be to the grantee, but may be to a third person authorized to receive the deed, or even to a stranger for the use of the grantee. It is not essential to prove a formal delivery. This may be inferred from the acts of the party without words or from words without acts, or from both combined. *Duer v. James,* 42 Md. 492, 496; *Hearn v. Purnell,* 110 Md. 458, 465;

Clark v. Creswell, 112 Md. 339, 342; *Renehan v. McAvoy,* 116 Md. 356, 359.

In *Carson v. Phelps,* 40 Md. 73, 97, an executor executed and acknowledged a deed to himself as trustee. It was never recorded, but was kept by him and carefully preserved among the papers relating to the trust estate. The Court said: "It is difficult to explain these facts upon any other theory than an intention on his part that the deed should operate as a creation or declaration of trust for the benefit and security of the parties in whose favor it was made. The fact that the paper remained in his possession can have little force or effect in disproving a delivery. Being a conveyance to himself as trustee, after its acknowledgment, it was in his possession in that character and no longer under his moral or lawful control as an individual. There could be nothing equivocal in such possession, as it was his legal duty to hold the deed as trustee; the law presumes the possession was held by him in that character." In *Hearn v. Purnell, supra,* the grantor gave the deed to his attorney, together with his will for safe keeping, but never directed a delivery to the grantee. Held, no delivery and no title passed. *Cf. Renehan v. McAvoy, supra.*

Not only must the grantor have parted with the possession of the deed or with the right to retain it, but, in order to constitute a valid delivery, the grantee must have accepted the deed. If the deed has been executed by the grantor without the grantee's knowledge or consent, there can have been no delivery to the grantee and he will not be visited with the consequences of ownership of the property purporting to have been conveyed by the deed. *Condon v. Sprigg,* 78 Md. 330, 335. Yet, even though the grantee may be ignorant of the delivery of the deed to another for his use, his assent may be presumed from the fact that he is benefitted by the transaction. *Clark v. Creswell,* 112 Md. 339, 342.

The due acknowledgment and recordation of a deed give rise to a *prima facie* presumption that it has been delivered to and accepted by the grantee. *Stokes v. Detrick,* 75 Md. 256, 264; *Dayton v. Stewart,* 99 Md. 643, 652; *Hartman v. Thompson,* 104 Md. 389, 408.

The clerk, after he has recorded the deed must return the same to the grantee, who is the proper party to receive it, and, therefore, the possession of the clerk will be regarded as the possession of the grantee. The fact of the recordation will consequently give rise to a *prima facie* presumption of delivery. *Stewart v. Redditt,* 3 Md. 67 79; *Hartman v. Thompson,* 104 Md. 389, 408. This presumption is liable to be rebutted by proof of facts and circumstances establishing a contrary intention. Where it is shown, for example, that the deed was fraudently recorded without the knowledge or consent of the grantee, there has been no valid delivery. *Stokes v. Detrick,* 75 Md. 256, 264. Where, although the deed was acknowledged and recorded, it was shown that the arrangement under which the deed was given and accepted was only conditional and was expressly made subject to the approval of the Board of Directors of the grantee and of its counsel, and such approval was expressly refused and the grantor was so notified, there was no valid delivery of the deed and no title passed thereunder. *Leppoc v. Bank,* 32 Md. 136, 145, etc.

DATE OF DEED.

A deed takes effect from the date of its actual delivery, when that date can be proved, and that date is the true date of the deed. In absence of proof of such date, there is a *prima facie* presumption that the deed was acknowledged and delivered on the day of its date. *Barry v. Hoffman,* 6 Md. 78, 87, etc.

Where, however, a deed is executed and acknowledged in different counties and necessarily on different days, the pre-

sumption arising from the date that the instrument was delivered on that day cannot stand against the positive averment in the acknowledgment that it was executed afterward. Under such circumstances there will be a *prima facie* presumption that the deed was delivered on the day of the date of the last acknowledgment in point of time. *Henderson v. Baltimore,* 8 Md. 352, 359.

In *Rawlings v. Lowndes,* 34 Md. 639, 644, a husband had taken title to a fee simple property and at the same time executed to his grantor a mortgage to secure part of the purchase money. The deed was dated and acknowledged the 28th of October and recorded the same day. The mortgage, though dated October 28, was not acknowledged until November 14 following, sixteen days thus intervening between the execution and delivery of the deed and the acknowledgment of the mortgage. The husband having died, his widow claimed dower in the mortgaged property. This claim was resisted by the mortgagee. Where a husband buys real estate and simultaneously with the delivery to him of the deed thereof, executes and delivers to his grantor a purchase money mortgage thereon, he is held to have had merely "instanteous seisin" thereof, which is not sufficient to entitle his wife to dower therein, as against the mortgage. As against the mortgage, he holds in such cases only the bare legal title without any beneficial interest. In this case the deed and mortgage were executed on the same day, but the mortgage was not acknowledged until sixteen days thereafter, and, therefore, could not have been delivered and become effective until that time. During the interval, the husband had a beneficial seisin of the land and the dower right of the wife, therefore, attached.

Unless the deed has been delivered by the grantor during his lifetime, it can never become a valid, effectual conveyance. Until actual delivery, a deed is subject to the full control of the grantor and may be destroyed by him at any time. The

manual delivery of such a deed by someone else to the grantee after the death of the grantor would be a void act, and should vest no rights in the grantee. *Carey v. Dennis,* 13 Md. 1, 19; *Hearn v. Purnell,* 110 Md. 458, 465.

After the deed has been executed and acknowledged by the grantor and by him delivered to the grantee, the grantor has divested himself of all title to the property granted. This title has passed to the grantee, and no subsequent act of the grantor with reference to the deed, not assented to by the grantee can in any way affect the latter's title. The insertion, therefore, by the grantor, after the delivery of the deed, without the consent of the grantee of another name as grantee can have no effect upon the title of the original grantee. Such alteration is a nullity and is void. *Clark v. Creswell,* 112 Md. 339; see also *Cole v. Pennington,* 33 Md. 476. Indeed, after the delivery to and acceptance by the grantee, no subsequent alteration of the deed by the grantee can affect his title which was consummated by the delivery, although such action may have the effect of vitiating the executory portions of the deed, such as the covenants of the grantor. *Clark v. Creswell, supra,* p. 343, etc.

DELIVERY IN ESCROW.

An escrow is a deed delivered to a stranger thereto, to be delivered by him to the grantee on the performance of some condition, or the happening of some contingency, and the deed takes effect only upon the second delivery. Until then the title remains in the grantor. A deed cannot be delivered directly to the grantee himself, or to his agent or attorney, to be held as an escrow. If such a delivery is made, the law will give effect to the deed immediately, and, according to its terms, divested of all oral conditions. *Hubbard v. Greeley,* 84 Me. 340, 17 L. R. A. 511.

Where a deed is delivered as an escrow to a third person, to be delivered to the grantee upon the performance by him of a certain condition, such second delivery relates back to, and the deed takes effect from, the date of the first delivery. And this is true even where the grantor has died in the intervening time or has become incompetent to execute a valid deed. *Carey v. Dennis,* 13 Md. 1, 18, etc.

Until the performance of the condition, the title to the land remains in the grantor. *Gorsuch v. Rutledge,* 70 Md. 272, 277. If he die before the performance of the condition, the title descends to his heirs, subject to the grantee's equitable interest. It follows, therefore, that the delivery of the escrow to the grantee by the depositary, before the performance of the condition, passes no title to the grantee. *Horner v. Spencer,* (Okla,) 17 L. R. A. N. S. 622. And, by the weight of authority, no title would pass even to an innocent purchaser for value from a grantee to whom such wrongful delivery had been made and who had put the deed on record, unless the grantor by his acts or by his failure to act has estopped himself to assert the condition of the deposit of the deed. *Hubbard v. Greeley,* 17 L. R. A. 511, note; *Wilkins v. Somerville,* (Vt.), 11 L. R. A. N. S. 1183.

CHAPTER XIX.

POWER OF ATTORNEY TO MAKE AND EXECUTE DEED FOR ANOTHER.

By a power of attorney, in this connection, we mean a written instrument executed by the donor conferring upon the donee power to execute a deed in his behalf of property therein described. Such an instrument must be attested and acknowledged in the same manner as a deed, and recorded with the deed executed in pursuance of such power. Code, Art. 21, Sec. 25; Code, Art. 10, Sec. 30. This means that the power may be recorded either at the time of, or before, the recording of the deed. When the power is once recorded, if, in deeds subsequently made, reference is made to the power and to the place where it is recorded, that is a sufficient compliance with the statute. *Rosenthal v. Ruffin,* 60 Md. 324, 326.

It is only by the power of attorney that the real owner is connected with the conveyance, and it is by and through the medium of such power that the title is transferred. The deed of itself is without operation unless by virtue of the power of attorney. *Ins. Co. v. Doll,* 35 Md. 89, 103.

Powers of attorney once given may be revoked either by the express act of the donor or by operation of law. Code, Art. 21, Sec. 26, it is provided that a power of attorney affecting real estate shall be deemed to be revoked when the instrument containing the revocation is recorded in the office in which the deed should properly be recorded. A power of attorney coupled with an interest cannot be revoked by the act of the grantor. But the power of attorney, whether coupled or not coupled with an interest, will be revoked by the death of the

donor, by operation of law. *Eichelberger v. Sifford*, 27 Md. 320, 329. But not as to a person, who dealt with the attorney with no knowledge of the fact of the death of the donor. Art. 10, Sec. 25.

At common law, a married woman could probably not convey her real estate or bar her dower by a power of attorney executed jointly with her husband. The Act of 1890, Ch. 394, provided that a married woman could by a power of attorney executed jointly with her husband authorize an agent or attorney to sell and convey her property. By Act of 1898, Ch. 457, she is probably given power to execute a power of attorney in every case in which her husband can do so. By Act of 1900, Ch. 195, a married woman is given power to authorize an agent or attorney to relinquish her dower by a power of attorney executed jointly with her husband, or by herself without the joinder of her husband. Code, Art. 45, Sec. 12.

METHOD OF EXECUTION OF DEED BY ATTORNEY.

A deed executed by virtue of a power of attorney may now be executed in either of two methods:

a. By the old common law method, or

b. By the method prescribed by Statute.

a. The common law method is to execute the deed in the name of the principal and as his act—A. B., principal, by C. D., his attorney.

As expressed in *Combe's case*, 9 Coke, 76b, cited in *Posner v. Bayless*, 59 Md. 56, 61, "When any person has authority as attorney to do an act, he ought to do it in his name who gives the authority, for he appoints the attorney to be in his place and to represent his person, and therefore, the attorney cannot do it in his own name, nor as his proper act, but in the name and as the act of him who gives the authority.

This is still the preferable method of executing deeds under

a power of attorney, and has not been rendered improper by the statute. *Posner v. Bayless,* 59 Md. 56, 61.

The acknowledgment should be that the attorney acknowledged the deed to be the deed of the principal.

b. The statutory method was first created by the Act of 1856, Ch. 154, Sec. 23; Code, Art. 21, Sec. 27. This section provides that any person executing a deed conveying real estate, as agent or attorney for another, shall describe himself in and sign the deed as agent or attorney. The proper form under the statute is that the deed is made by "A. B., attorney, by virtue of the power of attorney." It should be signed "A. B., attorney," and acknowledged—"that A. B., attorney, acknowledged the deed to be his act." *Ins. Co. v. Doll,* 35 Md. 89, 103; *Posner v. Bayless,* 59 Md. 56, 61.

The statutory form was not valid prior to 1856, it having first been made legal by the Act of that year. Prior to 1856 the common law form *only* was valid.

In *Harper v. Hampton,* 1 H. & J. 622, 709, the deed, executed by "Robert G. Harper, for and as attorney of J. R., and in pursuance of the power of attorney," was held invalid for the reasons given in *Combe's case,* 9 Coke, 76, already cited.

CHAPTER XX.

RECORDING OR REGISTRATION.

Under the English law, deeds were not required to be registered or recorded, except only in case of the deeds of bargain and sale, by virtue of the provisions of the Statute of Enrollments. Even at the present time, there is no general system of registration in England, although some of the counties have a system not dissimilar to the American system.

In this country, from an early period, each State has had a general registration law. In the absence of a system of registration, transfers of the legal title rank, between themselves, according to their priority in time, the transfer, first in point of time, taking precedence over subsequent transfers, and this will always be held to be the case where the subsequent transferee has notice of the prior transfer. Phelps' Juridicial Equity, Secs. 241, 242, 243, elaborating the doctrines of notice and priorities. Those rules have been entirely changed and modified by the system of registration or recording of title deeds and to a consideration of this system, as it prevails in Maryland, we must now turn our attention. The foundation of the Maryland system was laid as early as 1715, Acts 1715. Ch. 15, Sec. 4, rendering livery of seisin unnecessary to the validity of a deed, and the Act of 1766, Ch. 14, giving to the recordation of the deed of feoffment all the effect of the livery of seisin. *Matthews v. Ward,* 10 G. & J. 443, 448; *Evans v. Horan,* 52 Md. 602, 611.

By Act of 1766 and its amendments, the last of which were the Act of 1890, Ch. 210; Code, Art. 21, Sec. 1, and 1892, Ch. 4, Code, Art. 21, Sec. 3, no estate of inheritance or freehold or

any declaration or limitation of use, or any estate above seven years, shall pass or take effect unless the deed conveying the same shall be executed, acknowledged and recorded as provided in said article. Grants of, or covenants for, easements in land are included within the requirements of this law. *Dawson v. R. R. Co.* 107 Md. 70; *Falck v. Barlow,* 110 Md. 159, 161. The object of the new registry laws is to prevent frauds, actual or constructive, from being perpetrated, through the medium of unrecorded instruments, which are intended to qualify muniments of title, which give record notice of absolute ownership. The mischief intended to be prevented was the holding out of false colors of title to property by means of which credit could be secured. *Hoffman v. Gosnell,* 75 Md. 577, 594.

The recording is the final and complete act which passes the title. Until this is accomplished, everything else is unavailing. As the recording is necessary to the passing of the title, it must follow, as a matter of course, that until the recording takes place, the title remains in the grantor. *Regts. U. of M. v. Trustees, etc., of Church,* 104 Md. 635, 642; *West v. Pusey,* 113 Md. 569, 572. The registered deed shows the title; whatever other rights may arise from the unregistered deed, it cannot effect a transmission of the legal title. *Falck v. Barlow,* 110 Md. 159, 162. But after the registration has taken place within the period prescribed by law, the deed becomes effective between the parties from its date; i. e., the grantor is obliged to accord to the grantee all the rights which belong to ownership and title after that period. *Nickle v. Brown,* 75 Md. 172, 186; *Balto. City v. Peat,* 93 Md. 696, 699, 700.

Every deed of any of the interests or estates mentioned in Sec. 1, of Art. 21, shall be recorded within six months from its date in the county or city in which the land affected by such deed lies; and where it lies in more than one county or in the City of Baltimore and a county it shall be recorded in all the

counties and in the said city in which such land lies. Art. 21, Sec. 13.

Every deed when recorded as directed, shall take effect as between the parties from its date. (Sec. 14.) No deed shall be valid for the purpose of passing title until recorded as directed. (Sec. 15.) We have already considered the question as to what is the date of a deed. Ante p. 118.

The Clerks of the Circuit Court of the counties and of the Superior Court of Baltimore City are required to record all deeds, mortgages, bills of sale and other instruments required by law to be recorded. Code, Art. 17, Sec. 51; Constitution, Art. 4, Sec. 38. Unless the instrument is one required by law to be recorded, the Clerk is not bound to record it, and if he does so, no benefit will be derived from such recording. *Harbor Co. v. Smith,* 85 Md. 537, 543, 544.

The duties of the clerk with reference to instruments required to be recorded are as follows: He must record them in a well-bound book, which must contain an alphabetical index of the names of all the parties thereto. Code, Art. 17, Sec. 51. He must make a full and complete general alphabetical index in a book or books well-bound for that purpose, of all such instruments, which shall be both in the names of each and all the grantors and grantees, and shall refer to the book and page of the record of the several conveyances designating the same, and in this index, at the time of recording, he must note the names of the parties and the character of conveyance (i. e., whether deed, mortgage, lease, etc.) (Secs. 52, 53.) In addition, Block Index and Annex Index, in Baltimore City, and also Unlocated Conveyance Index.

Whenever the instrument to be recorded is required to be recorded within a specific time he must indorse thereon the time at which he receives the same. (Sec. 56.) The clerk is not required to record any paper until the fees for recording the same shall have first been paid (Sec. 51), and the cost of

making the alphabetical index above referred to is properly a part of such fees. *Peter v. Prettyman,* 62 Md. 566, 572.

When there are two or more deeds, mortgages or other conveyances to the validity of which recording is necessary, conveying or affecting the same lands or chattels real, the deed, mortgage or such other instrument that shall first be recorded according to law, if made bona fide and upon good and valuable consideration, shall be preferred. Code, Art. 21, Sec. 16. The deeds thus accorded preference are deeds to *bona fide* purchasers, and *bona fide* purchasers are persons who have either paid or advanced money upon the faith of their grantor's actual title to the property transferred, or who have accepted specific property in payment of a specific debt. As between such purchasers, having deeds of the same property, the deed first recorded is entitled to priority. An assignee for the benefit of creditors, however, it not such a *bona fide* purchaser. The property is conveyed to him to pay "pre-existing" debts, and not in consideration of money paid or advanced by him or by the creditors. Such an assignee stands in the place of the assignor and takes the property subject to all the equities against the assignor. He succeeds only to the rights of the assignor, and he cannot enforce a right which the assignor himself could not enforce, for it is a familiar principle that one cannot by his own voluntary act transfer to another a right or title which he does not himself possess. *Tyler v. Abergh,* 65 Md. 18, 26.

The deed, made *bona fide* and upon good and valuable consideration, that is first recorded will be accorded priority. *Swartz v. Chickering,* 58 Md. 290, 292. A subsequent deed, if first recorded, will always be preferred and will not be postponed unless the notice of the prior deed is so clearly proved as to make it fraudulent in the junior grantee to take and register his deed in prejudice of the known title of the grantee in the first deed. *Willard v. Ramsburg,* 22 Md. 206, 217.

A deed taken in payment and satisfaction of a pre-existing debt is upon such good and valuable consideration. *Busey v. Reese,* 38 Md. 264, 270. In this case, the facts were that on October 5, 1870, Eichelberger borrowed from Reese $300 and on the same day executed to him a mortgage of certain leasehold property to secure the re-payment of the loan. The mortgage was delivered to Eichelberger, who promised to have it recorded, but failed to do so, retaining it in his own possession until October 29, 1870, when at 12:15 o'clock P. M. it was recorded. In the meantime, on October 25, 1870, Eichelberger executed to Busey an absolute deed of conveyance of the same property, which was recorded before the mortgage, viz. on October 29, 1870, at 11:30 A. M. The deed, though dated and delivered later, was first recorded, and, therefore, entitled to priority under this section. A judgment-creditor is not a *bona fide* purchaser within the meaning of the law, and the fact that his judgment was recorded prior to the recording of the deed can avail him nothing. *Knell v. Bldg. Asso.* 34 Md. 67, 71; *McCalla v. Investment Co.* (Kan.), 14 L. R. A. N. S. 1255. Nor. as we have just seen, in an assignee for the benefit of creditors.

THE SIX MONTHS' PERIOD.

The period prescribed for the recordation of the classes of conveyances enumerated in Code, Art. 21, Sec. 1, is six months from the date of the conveyance. Art. 21, Sec. 13. Nevertheless, deeds or conveyances, except those operating by way of mortgage, may be recorded after the expiration of the six months' period, and when so recorded shall have, as against:

The grantor, his heirs or executors.

Against all purchasers with notice of such deed or conveyance.

Against all creditors of such grantor and his heirs who shall become such after the recording of such deed or convey-

ance, the same validity and effect as if recorded within the six months' period. Code, Art. 21, Sec. 18.

Prior to the Act of 1860, Ch. 133, Sec. 1, a deed or mortgage not recorded within the six months' period could only be validly recorded by decree of a Court of Equity. By this act, not only was the privilege of recording without decree after the six months given in the case of deeds thereafter executed, but its provisions were expressly made applicable to all deeds executed and acknowledged acording to law, whether before or after the act went into effect. *Barnitz v. Reddington,* 80 Md. 622, 625. In the case of mortgages the law has not been changed, and it is still the law that no mortgage can be validly recorded after the expiration of the six months' period, except after the obtention of a decree empowering such recordation in accordance with the provisions of Code, Art. 16, Sec. 33. *Harding v. Allen,* 70 Md. 295, 298.

Deeds of trust are not regarded as mortgages, even though given to secure a debt, and may, therefore, be recorded after the six months' perioo. *Stanhope v. Dodge,* 52 Md. 483, 490.

The provisions of the law permitting the registry of deeds after the expiration of the six months' period and of mortgages upon application to a Court of Equity, refer exclusively to deeds and mortgages executed and acknowledged according to law and perfect in all respects so far as depends on the act of the grantor or mortgagor. *Pfeaff v. Jones,* 50 Md. 263, 270.

Let us now consider the effect of recording a deed—first, within the six months' period, and second, after the expiration of the six months' period. In the first place, when a deed or mortgage is recorded within the six months' period it takes effect from its date. Code, Art. 21, Sec. 14. But this section was not intended to be in conflict with other parts of the law, or to impugn in any way its leading purpose to make the registry of deeds the official and authoritative expository of title to real and leasehold estates. The faith and credit which

the law intends to give to the registry would be greatly weakened if at any moment there could be a legal title by deed which did not appear upon the registration records. *Nickle v. Brown,* 75 Md. 172, 186.

Therefore, although the doctrine that the deed, when recorded within the six months, relates back to its date and takes effect as of that date is well established, and this rule will never be enforced against a *bona fide* purchaser for value without notice who becomes such between the date of the delivery and of the registry of the deed. A judgment-creditor, as we have seen, is not a bona fide purchaser, and his judgment recorded before the deed, but between the date of execution and registry, will be postponed to the deed thereafter recorded during the six months' period. *Knell v. Bldg. Asso.* 34 Md. 67, 70, etc. Query: When the rights of no creditors are involved and as between the parties, does a deed recorded after the expiration of the six months' period relate back to its date? *Link v. McNabb,* 111 Md. 641, 645.

When a deed is recorded according to law, it is notice to all the world of the title of the grantee. Anyone dealing with the property is affected with constructive notice of every paper (required by law to be recorded), and its contents, that may in any manner affect that property. The doctrine of constructive notice has no application to deeds or papers which may be, in fact, recorded, though not required or authorized so to be. *Harbor Co. v. Smith,* 85 Md. 537, 543; *Lambert v. Morgan,* 110 Md. 1, 27. The public has a right to rely upon the law of the State as enacted by the Legislature, and is not bound by any other constructive notice other than those laws provided.

That you may know with what classes of instruments constructive notice has to do, let us consider what instruments are required or authorized to be recorded. The most important are the following:

Creating or conveying estates of inheritance or freehold. (Grants of easements or covenants reserving easements in land are included in this provision.) *Dawson v. R. R. Co.* 107 Md. 70.

Deeds containing any declaration or limitation of use.

Deeds or leases assigning or creating leasehold estates above seven years. Code, Art. 21, Sec. 1.

Mortgages conveying any use, estate or interest in land. (This includes a mortgage of an equitable estate.) Code, Art. 21, Sec. 29; *Ins. Co. v. Ins. Co.* 10 Md. 517, 523, 524.

Powers of attorney to sell and convey real estate. Code, Art. 21, Sec. 25.

Bonds, writings obligatory or contracts for the conveyance of real estate or any interest or estate of, in or relating to real estate, or for the leasing and demising for any term of years, of real estate. Code, Art. 21, Sec. 28. An agreement by the owner of land by which a joint interest in the land is given to another party is clearly such an instrument as is entitled to be recorded, and when recorded operates as constructive notice. *Harbor Co. v. Smith,* 85 Md. 537, 542.

The proper registration of a conveyance entitled to be recorded, therefore, operates as constructive notice to all subsequent purchasers of any estate, legal or equitable, in the same property. *Abell v. Brown,* 55 Md. 217, 222; *Potomac Co. v. Smoot,* 108 Md. 54, 63. In all cases where a purchaser cannot make out a title, except by a deed which leads him to another fact, whether by description of the parties, recital or otherwise, he will be regarded as having full notice of such fact, for it would be gross negligence if he did not investigate the matter. *Ibid.*

But it is very clear that such notice can only be of what the record discloses. In *Brydon v. Campbell,* 40 Md. 331, 337, by mistake of the clerk, a deed was recorded as conveying an "undivided fourteenth" part of the land. The original deed

really conveyed an "undivided four-tenths." A subsequent purchaser was held to be affected with constructive notice of a one-fourteenth interest only in the grantee.

We have already seen that constructive notice is not given by the registry of an instrument not entitled by law to record. Moreover, unless a deed is executed and acknowledged in due form of law, it is not entitled to be recorded, and, if recorded, does not operate as constructive notice. *Johns v. Scott,* 5 Md. 81. Thus, the recording of a deed unacknowledged or defectively acknowledged gives no constructive notice. *Glenn v. Davis,* 35 Md. 208, 214, 215. In *Cockey v. Milne,* 16 Md. 200, 207, a mortgage acknowledged, but accompanied by no affidavit as to the bona fides of the consideration, even though recorded, was held effective only as against those having actual notice of it. The absence of the certificate of the clerk, where an acknowledgment is taken by a justice of the peace of another county than that in which the land affected by the deeds lies, renders the deed so defective that, even when duly recorded, it does not operate as constructive notice. *Sittler v. McComas,* 66 Md. 135, 140.

A failure to attest a deed does not avoid the effect of recording. *Brydon v. Campbell,* 40 Md. 331, 337.

Where an instrument of writing is required by law to be recorded, the enrollment of it is evidence of all circumstances necessary to give it validity. But this evidence is not conclusive; it is only *prima facie* and, like all *prima facie* evidence may be rebutted. To give it a conclusive effect would be most dangerous; an enrollment, however obtained, would exclude all inquiry. It would be a shield and protection to fraud, forgery and deceit. And, therefore, in spite of the registry, it is competent to show that the grantor was under a disability, or was induced to sign by fraud, duress or undue influence, or that there was no delivery of the deed, etc. *Dunnington v. Hubbard,* 65 Md. 87, 90.

Copies of deeds and other papers required by law to be recorded, certified by the Clerk of the Court where recorded, under the seal of his office, shall be evidence. Code, Art, 35, Sec. 59. But a certified copy of the record of such an instrument will not be evidence, if the instrument has been defectively executed or acknowledged. *Budd v. Brooke,* 3 Gill, 198, 230. If any of the formalities essential to the validity of the instrument do not appear therein, the natural presumption is that they were omitted. Being wanting, the copy which is made evidence would at once show their omission and be conclusive against the validity of the paper. Therefore, in such a case, the certified copy of the record is not evidence at all. *Sittler v. McComas,* 63 Md. 135, 138. Consequently, it was held that where, after the acknowledgment of a deed, a condition upon the estate therein granted was written immediately under the certificate of acknowledgment of the grantor, such condition was wholly void; that its recordation with the deed added nothing to its validity; that not being part of the deed it was improperly admitted to record, and that being so, a certified copy thereof was not competent evidence. *Cole v. Pennington,* 33 Md. 476, 480.

RECORDING DEEDS AFTER THE SIX MONTHS' PERIOD.

As we have seen, deeds may now be recorded after the expiration of six months, but mortgages may not be so recorded except upon application to a Court of Chancery, under Code, Art. 16, Sec. 33.

Code, Art. 21, Sec. 19, which permits the recording of deeds after the expiration of the six months' period, gives such deed so recorded validity and effect *only* as against—

The Grantor, his Heirs or Executors.

Purchasers with actual notice of such deed or conveyance.

Creditors of the grantee and his heirs who become such after the recording of such deed or conveyance. Bldg. Asso. v. Lusby, 116 Md. 173, 177.

The natural inference from the language used in this section would be that such a deed would not be good as against all creditors who became such *prior* to the recording of the deed. *Hearn v. Purnell,* 110 Md. 458, 466.

There are two classes of such creditors:

Those who became such *prior to the execution of the deed* and,

Those who became such *between the date of execution of the deed and the date of its recording.*

As to the second class of creditors—those who became such between the date of the execution and the date of the recording, without actual notice of its execution—there can be no question. Such creditors were clearly entitled to rely on the record title in the grantor, and, as against them, the deed cannot avail. If they are merely general creditors, and have no lien on the land, they are entitled to share in *pari passu* with the grantees in the deed in the proceeds of the sale of the land. *Hoffman v. Gosnell,* 75 Md. 577, 590.

The rule is the same in the case of general creditors of a mortgagor who became such creditors between date of the mortgage and its registry, by order of an Equity Court after the six months' period. They are entitled to share *pari passu* with the mortgagee. *Bldg. Assn. v. Wilson,* 41 Md. 506, 513; *Homer v. Balto. Heat. and Ref. Co.* 117 Md. 411, 425.

If, however, the creditors have acquired a lien upon the land, they would then have priority over the grantee in the deed or the mortgagee, as the case may be. *Stanhope v. Dodge,* 52 Md. 483, 491.

As to those creditors who became such prior to the date of the execution of the deed, the language of this section seems also to be clear. It seems to invalidate the deed not recorded

within the six months' period as to such creditors. But why should it do so? What difference can it make to them whether a deed made by their debtor, after he has become such, and in all other respects perfectly valid, is recorded before or after the expiration of six months? Code, Art. 16, Sec. 33, which provides for recording all deeds (including mortgages) not recorded within the six months' period upon application to a Court of Equity, makes a deed so recorded good as against creditors of the grantor who were such at the time of the execution of the deed. The Court of Appeals has construed this section and Sec. 19 of Art. 21 together, and the result of this construction is that deeds recorded after the six months' period, and mortgages recorded after application to a Court of Equity after six months and otherwise valid are entirely valid as against creditors of the grantor or mortgagor who were such at the time of the execution of the deed or mortgage. *Stanhope v. Dodge,* 52 Md. 483, 490.

The important distinction to be drawn between the recording of a deed and of a mortgage after the six months' period is that in the case of a deed it may be done by simply taking the deed to the record office and leaving it there for record just as if the six months' period had not gone by. But a mortgage cannot then be recorded except by order of court under Art. 16, Sec. 33. The mere clerical act of recording a mortgage after six months, without an order of court, is of no effect as to purchasers or creditors without an actual notice. *Pfeaff v. Jones,* 50 Md. 263. 272.

In this case a mortgage dated February 6, 1873, was recorded October 7, 1873, without an order of court. On January 16, 1876, a creditor, having no actual knowledge of the mortgage, obtained a judgment against the mortgagor in a cause of action which arose subsequent to the date of the mortgage. His judgment, being a lien upon the mortgaged property, was entitled to, and given priority over, the mortgage.

Such a mortgage stands as an unrecorded mortgage, valid only as between the parties. When recorded under an order of court it becomes constructive notice from the date of the recording. *Bldg. Assn. v. Wilson,* 41 Md. 506, 510.

POSSESSION OF LAND AS NOTICE OF TITLE.

An intending purchaser of land is, as a general rule, by the fact that the land is in the possession of a person other than he who is undertaking to sell it, charged with notice of the rights of such persons, to the extent that he could by reasonable inquiry have ascertained the nature of such rights. *Duval v. Wilmer,* 88 Md. 66, 77, etc. And this rule applies even as against a non-resident or as against any person who may not have had actual knowledge of the possession by a person other than the vendor. But this doctrine is only applicable to a case where the possession is under a claim of right or title to some *estate* in the land, which is established by proof, and not where there is a mere easement under a license which is subject to revocation at the will of the licensor and which is in fact revoked by sale and conveyance. *Shipley v. Funk,* 102 Md. 219, 228; *Niles v. Cooper,* 98 Minn. 39, 13 L. R. A. N. S. 49 (notes), and *Garbutt v. Mayo,* 128 Ga. 269, 13 L. R. A. N. S. 58.

Code, Art. 21, Sec. 20, provides that when the grantee, his heir or executor, in any deed or conveyance, shall take possession of the lands purporting to be conveyed thereby, such deed or conveyance, after being recorded (though not recorded within the six months' period) shall have against all persons from the time of taking possession as aforesaid the same effect and validity, to all intents and purposes, as if the same had been recorded in proper time. This provision, however, is subject to the requirement of Section 16, which accords priority to the first recorded of two deeds of the same property. This is simply one branch of the general doctrine of notice from

possession above enunciated, but goes farther and gives to possession under an unrecorded deed after its recordation all the effect of a duly recorded deed. The object of this provision is to substitute notice from possession for the constructive notice furnished by placing the deed on record. Possession by the grantee of the grantee under the unrecorded deed will be a sufficient possession to gratify the requirements of this provision. *Bryan v. Harvey,* 18 Md. 113, 129.

The possession which is sufficient to put a person on inquiry and which will be equivalent to actual notice of rights and equities in persons other than those who have a title upon record, must be actual, open, visible, not equivocal, occasional, or for a special purpose, and must be inconsistent with the title of the apparent owner by the record. *Dize v. Beacham,* 81 Md. 602, 607; *Polke v. Clark,* 92 Md. 372; *Hearn v. Purnell,* 110 Md. 458, 466. Actual possession of the part or of the whole of the premises will usually be sufficient notice. *Ringgold v. Bryan,* 3 Md. Ch. 488, 493.

In *Rogers v. Scharf,* 3 Gill, 127, 137, a trustee under decree sold land to H., whom he reported as purchaser, and the sale was ratified. The purchase money was, in fact, paid by S., who went into possession, and so remained, H having been his agent and having bought for him. Subsequently H. executed a lease of part of the land to W. It was held that S. had an equitable estate in the land, that W. had constructive notice sufficient to put him on inquiry, and that H. could not convey to him any estate in the land. *Valentine v. Seiss,* 79 Md. 187, 191.

The possession of one whose title is of record is not notice of any rights in him other than those appearing of record. A purchaser is justified in believing that he, whose title is of record, has fully described all his rights in his record title, and in attributing his possession to his record title. In some States, the continued possession by the grantor of the land conveyed

by him of record is held to operate as constructive notice to the purchaser from the grantee of any claims that the grantor may have to the land; other courts hold that the grantee's purchaser is entitled to rely on the record and to assume that the possession of the grantor is by sufferance of the grantee and does not indicate the existence of any adverse rights in him. The latter would seem to be the Maryland doctrine. It has been held that the simple fact that the grantor continued to occupy the property or part of it cannot detract from the force and effect of the recorded deed conveying the absolute title to the grantee. *Hoffman v. Gosnell,* 75 Md. 577, 593; *Garbutt v. Mayo,* 13 L. R. A. N. S. 115-121, note.

The presumption of notice of rights of a third person arising from his possession, or from the possession of his tenant, is, according to the weight of authority, merely *prima facie.* If the purchaser shows that he made due inquiry from all accessible means of information as to the rights of the person in possession and had just reason to believe that such person was in possession merely by permission of the vendor and without claim of any right in himself, this presumption will be given no effect. 2 Tiffany on Real Property, Sec. 480.

CHAPTER XXI.

TITLE BY DEVISE—SALES BY EXECUTORS OR ADMINISTRATORS.

The subject of transfer by will is fully treated in Treatises on Testamentary Law.

Real property disposed of by will passes directly to the devisees.

Leasehold property, as we have seen, passes to the legatee through the executor or administrator with the will annexed. 2 Tiffany Real Property, Ch. 20.

Sales by Executors or Administrators.

At common law, an executor or administrator had the absolute power to sell or dispose of the personal assets, including the chattels real of the decedent's estate, as he saw fit, and could pass a good title to the purchaser. *Miller v. Williamson,* 5 Md. 219, 230. At common law, and independent of any power conferred by will in the case of an executor, and in the absence of any express statutory power, an executor or administrator had no power to sell any of the decedent's real estate. *Pacy v. Safe Dep. & Trust Co.* 113 Md. 315.

The unlimited power of sale in case of chattels real conferred by the common law upon the executor or administrator was limited and cut down by the Act of 1843, Ch. 304, which provided that no executor or administrator should sell any property of his decedent without an order of the Orphans' Court, granting his letters, being first had and obtained, authorizing such sale, and any sale made without an order of court previously had as aforesaid shall be void, and no title shall

pass to the purchaser. Code 1904, Art. 93, Sec. 282. *Furhman v. Furhman,* 115 Md. 436, 439. And this rule applies to the converted or re-invested proceeds of portions of the estates of decedents, as well as to the property actually left by the decedent. *Alexander v. Fidelity & Dep. Co.* 108 Md. 541, 547.

It is the policy of our testamentary system to require a distribution in kind of the estates of deceased persons, unless a sale is necessary for a satisfactory division or the payment of debts, and it is for the court to determine whether the necessity exists. *Ibid,* 212, 548.

The Orphans' Court, which is a court of limited statutory jurisdiction, has power to order sales in the following classes of cases:

Where the executor or administrator shall not have money sufficient to discharge the just debts of and claims against the decedent. Code, Art. 93, Secs. 278, 279.

Whenever it shall appear that a sale is advantageous to the persons interested in the estate. Code, Art. 93, Sec. 280.

By the Act of 1906, Ch. 537, Sec. 281, it is provided that all sales of leasehold property theretofore made by executors or administrators without previous order of the Orphans' Court authorizing the same, but which were duly reported to, and ratified by said Orphans' Court, shall be valid to all effects and purposes as if such previous order had been obtained. This applies to all sales made prior to June 1, 1906. As to all sales made subsequent to that date or hereafter to be made, the old rule still prevails. *Alexander v. Fidelity & Dep. Co.* 108 Md. 541.

Whenever a sale of real or leasehold estate is made under the authority of the Orphans' Court or under a power contained in a will and is reported to said court for its ratification, the sale may be ratified at once without the publication of an order *nisi;* provided all parties in interest are *sui juris* and their

consent is given to such immediate ratification. Code, Art. 93, Sec. 296, Rule 9 of Orphans' Court of Baltimore City.

A testator may, however, by express provision to that effect in his will, authorize his executor to make sale of any property without application to the Orphans' Court. Code, Art. 93, Sec. 284. A mere power of sale, unless accompanied in the will by an express authorization to sell "without application to the Orphans' Court, will not do away with the necessity of the order to sell, without which, under Sec. 276, the sale will be void and no title will pass. A sale under such a power without the order to sell, therefore, will be held void and no title will pass. *Brooks v. Bergner,* 83 Md. 352.

SALES OF REAL ESTATE BY EXECUTORS AND ADMINISTRATORS.

As we have seen, executors or administrators, independently of some testamentary or statutory power conferred upon them, have nothing to do with their decedent's real estate. By Code, Art. 93, Sec. 80, an executor or administrator of a person who has sold real estate and died before receiving the purchase money, or conveying the same, may convey said real estate to the purchaser, and his deed shall be good and valid in law, and shall convey all the estate of the decedent as effectually as the latter's deed in his lifetime would have done; but such executor or administrator must satisfy the Orphans' Court that the purchaser has paid the full amount of the purchase money. *Stewart v. Griffith,* 217 U. S. 323, 331. By sections 290, 291, 292, the Orphans' Courts are given concurrent jurisdiction with the equity courts of this State, to order the sale of real estate of intestates where the appraised value thereof does not exceed $2,500, and to appoint a trustee to make such sale and convey the estate to the purchaser. *Snook v. Munday,* 90 Md. 701, 703.

The Orphans' Court which has jurisdiction to grant letters has jurisdiction to order the sale of decedent's real estate,

regardless of the county or city in which it lies. The appraised value of the real estate (not more than $2,500) and not the location thereof is the test of the jurisdiction of the Orphans' Court. *Cain v. Miller,* 117 Md. 45, 47.

From the language used in this case, it appears that the Orphans' Court cannot make a sale under this section without making all parties interested in the real estate to be sold, parties and the procedure in such cases will be found set out in Rules 6 and 17 of the Orphans' Court of Baltimore City. Such sales, however, are not made by executors or administrators, but by a trustee, appointed by the Court, although the administrator may be such trustee. *Simpson v. Bailey,* 80 Md. 422. If the administrator sells, the title cannot be attacked in a collateral proceeding. *Ibid.*

Where an executor is authorized and directed by will to sell the real estate of testator, he may sell and convey the same and shall account therefor to the Orphans' Court of the county where he obtained letters in the same manner that an executor is bound to account for the sales of personal estate, but such sale shall not be valid or effectual unless ratified and confirmed by the Orphans' Court after notice by publication given in the same manner as practiced in cases of sales of land under decrees of Courts of Equity. Code, Art. 93, Secs. 287-289.

A sale made by an executor under such a power must be made strictly according to the terms of the power, and the Orphans' Court has no jurisdiction to order or to ratify a sale not so made. Thus, where real estate was left to testator's widow for life and after her death to be sold by the executor, that power could not be exercised during her life, and the Orphans' Court cannot direct a sale thereof to be made, nor ratify a sale made, by the executor prior to her death. *Snook v. Munday,* 90 Md. 701, 703, 704.

CHAPTER XXII.

SALES UNDER EXECUTION.

We shall hereafter study more fully the nature of the judgment lien upon lands and chattels real exceeding five years in duration. This lien is enforceable by the writ of *fieri facias* under which the property is sold by the sheriff and a deed made by the sheriff to the purchaser. Code, Art. 83, Secs 1-7.

It is with the title acquired by such purchaser that we are now concerned. A sale made under an execution vests in the purchaser all the title belonging to the judgment debtor at the time of the rendition of the judgment. *Manton v. Hoyt,* 43 Md. 254, 265. The purchaser takes subject to any right of possession or title which antedates the judgment and which could have been enforced against the judgment debtor. *Valentine v. Seiss,* 79 Md. 187, 190.

For example, the purchaser of an equitable estate at execution sale acquires only the equitable interest of the judgment debtor, and steps into the position of the latter as to trusts and legal estates vested in trustees. *Shryock v. Morris,* 75 Md 72, 80. A judgment creditor of the husband has no lien upon, and cannot sell property held by the husband and his wife as tenants by the entireties. *Jordan v. Reynolds,* 105 Md. 288, 293, 294. As a consequence, the purchaser at the execution sale takes subject to all liens and equities that might have availed as against the judgment debtor. As we have seen, a judgment creditor is not a bona fide purchaser for value. He, therefore, takes the land subject not only to such liens and equities as would be valid as against a bona fide purchaser, but also subject to additional liens and equities which would have yielded to the superior claims of a bona fide purchaser. He

takes, therefore, not only subject to the lien of prior conveyances of record properly executed, but also subject to the lien of prior conveyances defectively executed. Therefore, an equitable mortgage will be accorded priority over a subsequently recovered judgment. *Dyson v. Simmons,* 48 Md. 207, 214; *Supply Co. v. McColgan,* 100 Md. 479, 480.

The rule that the purchaser acquires only the title of the judgment debtor is strictly adhered to, though the purchaser have no notice of unrecorded liens thereon or equities therein. The facts in *Valentine v. Seiss,* 79 Md. 187, will illustrate this statement. At an execution sale on a judgment against "A," "B" bought property standing on the records in "A's" name and received a deed therefor from the sheriff on August 12, 1892. It afterward appeared that "A," more than three years before, had conveyed his interest in the land to a third party by a deed executed prior to the date of the judgment, but recorded in 1893. The court said that "A" had no interest in the land at the date of the judgment, and as the purchaser acquired only "A's" interest at the date of the judgment, the sheriff's deed conveyed absolutely nothing. In this case, the purchaser from "A" had gone into the possession of the land and made improvements thereon prior to the contracting by "A" of the debt upon which the judgment was subsequently rendered. *Ibid.* p. 191.

In order that the purchaser at the execution sale may acquire good title, the court must have had jurisdiction over both the subject-matter of the suit and over the parties thereto.

To illustrate:

1. *As to the subject-matter.* The court does not acquire jurisdiction over the land to be sold unless there has been an actual levy thereon by the sheriff by going on to the land. The seizure of the land is indispensable. *Duvall v. Perkins,* 77 Md. 582, 586.

The levy may be made at any hour of the day or night, except Sunday, and must be made before the return day of the writ, and the return must show actual entry and levy. *Jarboe v. Hall,* 37 Md. 345, 351. The sheriff's schedule and return to the writ of *fieri facias* must describe the property seized with reasonable certainty, sufficient to locate the property seized. Poe on Practice, Secs. 657, 658.

2. *The court must have jurisdiction over the person whose land is to be sold.*

Thus, where the judgment debtor had not been personally summoned, but two *non ests* had been returned, a judgment against him *in personam* would be absolutely void; the court would have no jurisdiction over him, and an execution issued upon such a judgment and a subsequent sale of the debtor's lands under a *fieri facias* upon such judgment would transmit no title to the purchaser. *Deakins v. Rex,* 60 Md. 593, 598.

In examining a title derived from a sale under execution one must therefore assure himself:

1st. *That the court had jurisdiction over the property sold.*

2nd. *That it had jurisdiction over the judgment debtor.*

The law looks with favor, however, upon sheriff's sales and avoids only those in which there is some serious or jurisdictional defect. If the proceedings, though for some reason irregular, are not void, but voidable only, they cannot be attacked in a collateral proceeding. *Miles v. Knott,* 12 G. & J. 442, 452.

Upon the sheriff's return, however, the judgment debtor may have the sale quashed for any matters which render it irregular and voidable. A motion to quash is a direct attack upon the sale and not an attack made in a collateral proceeding, as in *Miles v. Knott, supra,* which was a subsequent action in ejectment for the land in question. Poe on Practice, Secs. 654 to 665, inclusive.

Prior to the passage of the Act 1888, Ch. 235, Code, Art. 52, Sec. 35, a justice of the peace could under certain circumstances issue a *fieri facias* for the sale of lands. By virtue of the provisions of this act, execution upon a magistrate's judgment upon lands can now issue only from the court in which the magistrate's judgment is recorded, upon a writ of *fieri facias* directed to the sheriff.

CHAPTER XXIII.

SALES UNDER DECREE OF A COURT OF CHANCERY.

These matters are more properly subjects to be treated in a treatise upon Equity, and can only be treated in the barest outlines here. They really involve not an inconsiderable part of the whole subject of equity jurisdiction and procedure in this State. The principal cases in which equity can decree a sale of property are the following:

Foreclosure of Mortgage. Code, Art. 16, Sec. 202; Balto. City Code 1906, Secs. 720-732.

Creditor's Suit. Code, Art. 16, Sec. 203; Act 1900, Ch. 390.

Vendor's or other Equitable Lien. Code, Art. 16, Sec. 208.

Change of Investment. Code, Art. 16, Sec. 213. *Levering v. Gosnell,* 115 Md. 582, 591.

Mortgage and Investment of Proceeds. Code, Art. 16, Sec. 214.

Sale of Burial Grounds. Code, Art. 16, Sec. 103.

Partition suits where land held jointly or in common is incapable of division in kind. Code, Art. 16, Sec. 129; Act 1900, Ch. 205; Act 1904, Ch. 535. *Rowe v. Gillelan,* 112 Md. 108, 111.

Of the real estate of infants, when sale is advantageous. Code, Art. 16, Secs. 53, 54.

Of persons non compotes mentis. Code, Art. 16, Secs. 108, 109, 112; Act 1894, Ch. 221. As to appointment of committee upon writ *de lunatico de inquirendo,* see *Supreme Council v. Nicholson,* 104 Md. 472; *Packard v. Ulrich,* 106 Md. 246.

Of non-residents. Code, Art. 16, Secs. 86, 117.

Of decedents leaving property to be sold for the payments of debts or other purposes. Code, Art. 16, Sec. 90.

Where person owning land dies and it is not known whether he has left heirs. Act of 1908, Ch. 96.

In each of these cases, the procedure indicated by the statute and the jurisdictional averments required by the statute must be strictly followed and made. In each case, the statute should be carefully studied.

Two rules must be strictly complied with in order to give the purchaser a valid title.

1st. *The Court must have jurisdiction over the subject-matter of the suit.* This jurisdiction cannot be acquired unless the facts necessary to give the Court jurisdiction are alleged in the bill of complaint. E. G., Code, Art. 16, Sec. 129, provides for a sale of lands held in jont ownership if they cannot be divided without loss or injury to the parties interested. If this fact be not set out in the bill of complaint, the sale will be a mere nullity and no title will pass to the purchaser there under. The court has not acquired jurisdiction, because the allegation of this fact is required to give the court jurisdiction. *Fox v. Reynolds,* 50 Md. 564, 571. It is not necessary that these express words should be used, but their substantial equivalents must be used in order that jurisdiction may be acquired. *Ballantyne v. Rusk,* 84 Md. 649, 651.

2nd. *The court must have jurisdiction over the parties to the suit*—that is *all persons* having an interest in the property to be sold must be made parties to the suit, either actually, constructively or by representation, or otherwise the decree will not in any manner affect their interests, and the property will pass to the purchaser subject to their interests. *Handy v. Waxter,* 75 Md. 517, 522, etc. Persons in interest within the jurisdiction of the court must be actual parties to tthe suit by

personal summons within the State of Maryland, in order to bind their interests in the property, unless sufficiently represented for the purpose of the suit by some person who is actually or constructively a party to the suit. In order to bind the interests of non-residents of Maryland who cannot be personally summoned within the State, they must be notified by publication under Secs. 75 or 105 of Art. 16, or by personal service outside the State, under the provisions of Act 1896, Ch. 38. *Fisher v. Parr,* 92 Md. 245, 272. Certain persons, though neither actual nor constructive parties to the suit, will be regarded as parties to an extent sufficient to bind their interests in the property in issue by virtue of their relation to certain persons actual or constructive parties to the suit, e. g., remaindermen will be represented by their respective life tenants in case of partition in kind. Such persons are known as *quasi* parties or parties by representation. *Kingan Packing Assn. v. Lloyd,* 110 Md. 619, 625; see *Balto. City v. U. R. and Elec. Co.* 108 Md. 64; also Act 1906, Ch. 337 upheld in *Kingan Packing Assn v. Lloyd,* 110 Md. 619, 624.

The interests of all actual, constructive or *puasi* parties will be bound by the decree and will pass to the purchaser at the sale. The interests of no other person will pass. *Long v. Long,* 62 Md. 33, 63, 66, 68; *Ball v. Safe Deposit Co.* 92 Md. 503, 507. It is, therefore, imperative in order that good title should pass that all persons having any interest in the property to be sold should be made parties to the suit. Phelps' Equity, Sec. 25. The Court does not undertake to sell more than the title of the parties to the suit, and the doctrine of *caveat emptor* applies. *Scarlett v. Robinson,* 112 Md. 202, 208; *Columbia Paper Bag Co. v. Carr,* 116 Md. 541, 544.

The court must have jurisdiction both of the subject-matter and of the parties, in order that good title may pass by the sale under the decree. If the court has acquired such jurisdiction and makes a decree for the sale of the property and it

is sold, the purchaser will acquire a good title, even though the decree under which the sale is made is subsequently reversed by the Court of Appeals. *Benson v. Yellot,* 76 Md. 159, 168. And where the court has such jurisdiction, any mere irregularity in the proceeding or defect in the proof cannot be availed of to impeach the decree or the sale made under it collaterally. *Hamilton v. Traber,* 78 Md. 26, 28; *Scarlett v. Robinson,* 112 Md. 202, 206.

While it is unquestionably true that the court must have acquired jurisdiction over both the subject-matter and the parties in order that a valid title may pass under the decree in the case, the effect of the failure of jurisdiction as to these requirements is not exactly the same as in the case of both of them. Want of jurisdiction as to the subject-matter of the proceeding renders the decree absolutely *void.* Want of jurisdiction as to one or more of the persons in interest renders the decree as to such persons voidable but not *void.* The proceedings may be avoided by those who have been thus injured. They may not, however, be attacked collaterally by third parties. *Packard v. Ulrich,* 106 Md. 246, 252; *Royal Arcanum v. Nicholson,* 104 Md. 472.

CHAPTER XXIV.

TAX TITLES.

We shall presently see that State, county and municipal taxes are liens upon the real estate upon which they are levied and that said estate may be sold for the non-payment of such taxes. The title acquired by the purchaser at such a sale is known as a tax title. The purchaser at a tax sale, when the proceedings are regular, is clothed with a new and complete title in the land under an independent grant from the sovereign authority, which bars or extinguishes all titles and incumbrances of private persons, and all equities arising out of them. *Textor v. Shipley,* 86 Md. 424. E. G., such a sale will extinguish a right of way in the land sold for taxes assessed to the owner of the fee. *Hill v. Williams,* 104 Md. 595, 604; *McMahon v. Crean,* 109 Md. 652, 665.

At common law, the burden is upon any person who claims title to land derived from a sale thereof for taxes to prove, affirmatively and by proper evidence, that every mandatory provision of the law under which the sale was effected was strictly complied with; that each step in the proceedings, from the assessment of taxes to the execution of the deed, was formally and regularly taken by the officers or persons thereto legally authorized and that he or his grantor was the purchaser at the sale. The *onus* was on the purchaser at the tax sale to establish affirmatively that the officers of the law had acted strictly in conformity with the law. There was no presumption in favor of the validity of any of the official acts necessary to make the tax title good. *Polk v. Rose,* 25 Md. 155, 160; *Stewart v. May,* 111 Md. 162, 174.

This is true because the power of sale vested in a collector of taxes is a naked power, especially conferred by a statute, to be exercised under a proceeding *ex parte* in its character, the effect of which is to divest a citizen of his property without his consent and often without his actual knowledge. It is, therefore, established as an indubitable principle, that a purchaser who claims under a power of this nature must show affirmatively and positively the regularity of the proceedings upon which his title depends. *McMahon v. Crean,* 109 Md. 652, 665.

And this was the state of the law of tax titles in the State of Maryland up to 1867 (Ch. 186) in the counties and 1870 (Ch. 312) in Baltimore City. By the provisions of these laws, Code, Art. 81, Sec. 52, it is made the duty of the collector of taxes to report the sales made by him to the Circuit Court of the county or of Baltimore City, as the case may be; the court then must examine the proceedings, and if they appear to be regular, shall order notice to be given by advertisement, warning all persons to show cause why the sale should not be ratified and confirmed, and if no sufficient cause is shown to the contrary the sale shall be ratified, and the purchaser, on payment of the purchase money, shall receive a deed from the tax collector and shall have a good title to the property sold.

This statute was passed to relieve the purchaser of the *onus* existing at common law of proving the complete regularity of the proceedings, and to encourage purchasing at tax sales. The effect of the order of ratification is to change the burden of proof by establishing for the purchaser a *prima facie* case, and to cast the *onus* of showing that the provisions of the law here have not been complied with upon the person assailing the proceeding. *Hill v. McConnell,* 106 Md. 574, 577. This order of ratification is not, however, conclusive in support of the sale. Indeed, it is not within the province of the Legislature in a mere *ex parte* proceeding, like that provided for in this State,

to make such ratification absolutely conclusive. *Baumgardner v. Fowler,* 82 Md. 631, 639. Until proof of the illegality of the proceeding, the sale, if ratified, stands good and effective by operation of the Statute, but upon proof of any such illegality the whole proceeding is rendered void. *Guisebert v. Etchison,* 51 Md. 478, 486, etc.; *McMahon v. Crean,* 109 Md. 652, 666.

It is only necessary that there shall be a substantial compliance with the tax law under which the sale was made. The court will presume that the collector has discharged his duty, and no presumption will be invoked against the validity of the proceedings. But where it appears by the record, or by proof, that material and substantial provisions of the law have not been observed in making the sale, it will be treated as utterly null and void. *McMahon v. Crean,* 109 Md. 652, 666, 667. Jurisdictional defects may be availed of by collateral attack upon the proceedings. *Mullen v. Brydon,* 117 Md. 554, 559.

When, however, a party claiming to be the true owner of land sold for taxes voluntarily comes into a Court of Equity to which the sale has been reported, and becomes a party to the proceeding by excepting to its ratification and is heard in support of his exceptions, which are overruled and the sale is ratified, he, by his own conduct, brings himself and his claims within the operation of the principle of *res adjudicata,* and his claims are thereby concluded. *Hill v. McConnell,* 106 Md. 574, 577.

Examples of illegality rendering sale void: In *Baumgardner v. Fowler,* 82 Md. 631, 640, the law provided for notice of the sale by advertisement in the newspaper and by posting of handbills. The former notice was given, the latter was not. The sale was duly ratified by the court. The absence of the notice required was a jurisdictional defect, and the sale was absolutely void. In *Taylor v. Forrest,* 96 Md. 520, the sale had been made by one City Collector, who shortly thereafter

went out of office. His successor reported the sale and made the deed to the purchaser. The court construed the law as requiring the report of sale and the deed to be made by the collector who made the sale. The deed in this case was held to be absolutely void, and no title passed thereunder. Act 1904, Ch. 281; Code 1904, Art. 81, Sec. 59.

Sec. 2 of this Act provides that whenever any property in the City of Baltimore has been sold for taxes pursuant to law by one City Collector, and such sale has been reported by the said Collector who made the sale, but the deed for such property has been executed and delivered by the successor in office of the City Collector who made the sale and report as aforesaid, such conveyance shall be as valid to all intents and purposes as it would have been if made by the City Collector who made and reported the sale. This provision is a perfectly valid exercise of the legislative power. It would have been perfectly valid for the legislature to have authorized the successor in office of the City Collector to make the deed and this Act, which validates the deed of such Collector, cannot be said to violate any of the vested rights of the owner. His rights in the property were divested by the tax sale. Instead of designating some particular person to execute a deed to the purchaser for the property sold, the Act merely validates the deed already executed. *McMahon v. Crean,* 109 Md. 652, 669.

There are so many possible grounds on which, if established, tax sales may be held to be invalid, that tax titles are looked upon with suspicion. For example, in *Richardson v. Simpson,* 82 Md. 155, there was an insufficient description of the property to be sold in the advertisement of sale. *Cf. Hill v. Williams,* 104 Md. 595, 605. In *Young v. Ward,* 86 Md. 413, the County Treasurer's report of sale was defective. In *Benzinger v. Gies,* 87 Md. 704, the collector's report stated that the notice had been served on a certain person. It was proved that he had died several years prior to the alleged service. In

all these cases the sales were held to be void for the reasons given.

In order to avoid this uncertainty as to the validity of a tax title, which, as we have seen, grows out of the fact that it is an *ex parte* proceeding, in some of the states, e. g., Illinois, it is provided by statute that the tax collector must institute suit against the delinquent tax-payer in some court of record, and he is authorized to make a sale of the land only under the decree or judgment of the court. The proceeding, though differing somewhat from the ordinary action at law, is essentially the same, and has the same general effect as to the conclusiveness of the judgment. If the property is sold under such a judgment, the purchaser's title cannot be affected by any irregularity not taken advantage of in the judicial proceeding, unless the irregularity amounts to a jurisdictional defect. Such defects will vitiate even such a proceeding, as they will any form of judicial proceeding.

CHAPTER XXV.

TITLE BY ADVERSE POSSESSION.

By the adverse possession of land belonging to another, for the period prescribed by the statute for the bringing of an action to recover land, not only the right to bring such action is barred, but the person in possession is usually regarded as acquiring the ownership of the land in fee simple. Even in early times in England, there were adopted numerous statutes limiting the time within which an action could be brought on account of a disseisin of land. These statutes merely fixed certain "notable times, e. g., the beginning of the reign of Henry I, the return of John from Ireland, the journey of Henry III, into Normandy, and the coronation of Richard I, back of which the claimant asserting title to land, was not permitted to go in his pleading setting up his cause of action. Banning on Limitations of Actions, 3rd Ed. p. 1.

The modern statutes name a certain number of years beyond which no disseisin can be alleged. The last statute which adopted the former method of limitation was that of Westminster I, c. 39, which forbade the allegation of seisin in an ancestor prior to the beginning of the reign of Richard I (A. D. 1189), and for other writs fixed the year 1217. Thus, under this statute which was passed in the year 1275, the period of limitation for some writs was 58 years, and this period was lengthened as time went on without any change in the law, so that it exceeded 300 years, when, by 32 Henry VIII, c. 2 (1540), a change was made, and the modern method was adopted of fixing a certain number of years within which the action must be brought. This last statute, however, applied

only to the old real actions, and the action of ejectment having to a great extent taken their place, the Statute of 21 James I, Ch. 16 (1623), was passed, which, with the modifications made by the Acts of 1852, Ch. 177, 1884, Ch. 502, 1894, Ch. 661, is the law of Maryland today. *Safe Dep. & Trust Co. v. Marburg,* 110 Md. 410, 414. Sec. 1 of this Act provides that no person shall make entry into any land, etc., but within 20 years after his right of title shall accrue. Sec. 2 provides that if any person shall, at the time the right accrues, be under age, *feme covert, non compos mentis,* imprisoned or beyond the seas, he may, nevertheless, bring his action, and that such person or his heirs may bring his or their action, within 10 years after the removal of the disability or death. Alexander's British Statutes, 446; *Wickes. v. Wickes,* 98 Md. 307, 325.

This statute, while not in terms applying to actions of ejectment, did so in effect by barring the right of entry on which the action depended. Possession by another person, under the statute, deprives the owner of the right to maintain his action of ejectment, or, as sometimes stated, "tolls the entry of the person having the right." *Waltemeyer v. Baughman,* 63 Md. 200, 204. A possession for the statutory period which is sufficient to bar an action to recover the land is known as "adverse possession," and one who thus acquires rights in land as against the former owner, is said to acquire title by "adverse possession." 2 Tiffany Real Property, Sec. 436; see Chapter 1 p. 2, *ante.*

Thus defined, it will be seen that the possession necessary to give title to land must be adverse to that of the former owner, and we must now consider what is meant by *adverse possession.* No matter in what jurisdiction the determination of what constitutes adverse possession may arise, the decisions and the text books are unanimous in declaring that it must be:

ACTUAL.
VISIBLE.
NOTORIOUS.
HOSTILE.
EXCLUSIVE.
CONTINUOUS during the period of time necessary to create a bar under the Statute of Limitations.

Let us take up these six elements in their order:

THE POSSESSION MUST BE ACTUAL.

In determining the question as to whether one has *actual possession* of property, we must take into consideration its character and locality, and the uses and purposes for which it is naturally adapted, for the possessory acts over an outlying and uncultivated piece of land and may be proved by acts of ownership somewhat different from what will be required in regard to land under inclosure and in actual cultivation. *Sadtler v. Peabody Heights Co.* 66 Md. 1, 5; *Merryman v. Cumberland Paper Co.* 98 Md. 223-228.

There must be some positive act on the part of the claimant, and not merely a failure to recognize the rights of the owner. *Sharp St. Station v. Rother,* 83 Md. 289-294. There must be acts of positive user and ownership on the part of the claimant. A survey, unaccompanied by any other act of user and occupation, is not such a distinct and notorious act of possession as will justify the reasonable presumption of an ouster, or that the claimant went upon the land with a palpable intent to claim the possession as his own. *Beatty v. Mason,* 30 Md. 409-414. Cutting and selling timber from the land or digging and selling sand therefrom, from time to time, are mere successive act of trespass against the true owner and do not amount to adverse possession. *Gent v. Lynch,* 23 Md. 65; *Parker v. Willis,* 60 Md. 19; *Peters v. Tilghman,* 111 Md. 227, 240.

The mere payment of taxes upon the land claimed is not in itself sufficient to prove an adverse possession, but, taken in

connection with open and public acts of ownership, is a pregnant fact to be considered. *Sadtler v. Peabody Heights Co.* 66 Md. 1, 7; *Carter v. Woolford,* 71 Md. 283, 287.

Thus, where a party put up a stable on the land, used it and paid taxes thereon, that was held to be satisfactory evidence of adverse possession. *Baltimore v. Rowe,* 107 Md. 704, unreported; *Cadawalader v. Price,* 111 Md. 310, 319. This is true because the payment of taxes is a declaration of a claim to the land, because it is a discharge of a burden which legally rests only upon the owner of the land. *Cf. Hackett v. Webster,* 97 Md. 404, 410, holding that payment of taxes on whole tract where possession is not definitely shown is not evidence sufficient to establish possession of whole tract. Conversely, where the claimant, by his return under oath, fails to include the land as belonging to him for tax purposes, he cannot be said to have open, notorious and continuous possession. *Baltimore v. Rowe, supra.*

There can be no adverse possession of land entirely covered by water, because there can be no possession of such land. *Hoye v. Swan,* 5 Md. 237-242.

Prior to the Act of 1852, Ch. 177, Code, Art. 75, Sec. 76, one who went into the possession of land as a mere wrongdoer and without any claim of title in good faith, acquired title only to the land actually inclosed on four sides by him. Possession embracing all other requirements was not sufficient without actual inclosure. *Hoye v. Swan,* 5 Md. 237, 254. By virtue of the provisions of this act, actual inclosure is no longer the exclusive criterion of possession, but acts of exclusive user and ownership, other than inclosure, may be offered in evidence as establishing possession, but inclosure is still persuasive evidence. *Starr v. James,* 84 Md. 282, 290. This Act of 1852 is not retroactive, is in contravention of the common law, and must, therefore, be strictly construed. Possession, therefore, claimed under it must be established with clearness and pre-

cision. *Thistle v. Frostburg Coal Co.* 10 Md. 129, 146; *Safe Dep. & Trust Co. v. Marburg,* 110 Md. 410. When one enters upon land without color of title, his actual possession can not be extended by construction. *Hackett v. Webster,* 97 Md. 404. But, even at common law, one who entered upon another's land under what was called "Color of Title," was regarded sometimes as in possession of more land than he actually occupied. If one makes a claim to, or entry upon, land in good faith, by virtue of an apparently good title, even though the title were actually bad, he is said to have "color of title." Thus, a void limitation in a will to the person claiming it, if he claim title in good faith, gives him "color of title." *Lurman v. Hubner,* 76 Md. 268, 270.

Similarly, in the case of a defective deed, or of a deed valid in form from one who has not good title,or indeed, any title. *Hoye v. Swan,* 5 Md. 237, 247; *Cadwalader v. Price,* 111 Md. 310, 313, 319. Or where some of the deeds in the chain of title contain erroneous descriptions. *Sullivan v. Buckner,* 107 Md. 33, 36, 37. Likewise, in the case of a deed to a religious corporation void for non-compliance with Art. 38 of the Declaration of Rights. *Grove v. Trustees,* 33 Md. 451; *Regents v. Trustees,* 104 Md. 635, 640; *Greenleaf v. Bartlett,* (N. C.) 14 L. R. A. N. S. 660. And in the case of possession under a defective tax deed. *Bradbury v. Dumond,* 80 Ark. 82, 11 L. R. A. N. S. 772, subject note.

Color of title is such title as in appearance is good and sufficient, but which, in realty, is not good and effectual. *Baker v. Swan,* 32 Md. 255, 258; *Kopp v. Herman,* 82 Md. 339, 350.

But there must be occupancy under some writing; a mere parole gift, or right to enter upon land, is not effective, and, therefore, is not possession under color of title.. *Walsh v. McIntyre,* 68 Md. 402, 414. But possession under a bond of conveyance is possession under color of title. *Allen v. Van Bibber,* 89 Md. 434, 436.

The doctrine of constructive possession under color of title cannot prevail as against the true owner of the whole tract in possession of part thereof. He has title and is in actual possession of part, and, therefore, as against him, one who claims adversely is regarded as being in possession of so much only of the tract as he actually occupies. *Schlossnagle v. Kolb,* 97 Md. 285, 290.

The rights of one who took possession of land under "color of title," even at common law, were greater than those of one who entered as a mere wrongdoer. The former's possession was held to cover all the land conveyed or devised under the instrument under which he claims, whether inclosed or not. *Lurman v. Hubner,* 75 Md. 268, 271. This, of course, is still the law.

THE POSSESSION MUST BE VISIBLE, and

NOTORIOUS.

This is required so that the owner may have an opportunity to learn of the adverse claim and to protect his rights. Actual knowledge of the possession on the part of the true owner is not necessary. It is sufficient that he could have learned thereof by going upon the land and making inquiry. In general, it may be said, that those acts which go to make possession *actual,* likewise suffice to make it *visible* and *notorious.*

THE POSSESSION MUST BE HOSTILE.

The possession to be *adverse* must be *hostile* to the true owner. A mere permissive holding cannot be adverse. *Stump v. Warfield,* 104 Md. 530, 551. When the acts relied on are done with the consent or permission of the true owner, they cannot be regarded as adverse. *Armstrong v. Risteau,* 5 Md. 256, 279; *McCutcheon v. McCutcheon,* (S. C.) 12 L. R. A. N. S. 1140, note. *Jacobs v. Disharoon,* 113 Md. 92. Thus, ordi-

narily, the possession of a tenant or of a mortgagee is permissive, and not adverse. Where one goes into possession by permission of the owner, the presumption is that the possession continues in that way, until evidence of an adverse holding is given. *Sharp St. Station v. Rother,* 83 Md. 289, 303. Again, a tenant holding over after the expiration of his time is presumed to hold permissively, and the mere non-payment of rent is not of itself sufficient to indicate an intent to hold adversely. *Campbell v. Shipley,* 41 Md. 81, 97; *Smith v. Heldman,* 93 Md. 343, 350; *Townsend v. Boyd,* 217 Pa. 386; 12 L. R. A. N. S. 1148, note.

By Code, Art. 53, Sec. 26, if there be no demand, tender or payment of rent for 20 years, such rent shall be extinguished and the landlord shall have no further claim to the lot or the rent.

In *Lewis v. Kinnaird,* 104 Md. 653, 655, a ground rent of two peppercorns, if demanded, not shown to have been demanded for 75 years, was held to be barred by the provisions of this statute. This rent was reserved upon a lot with a front of 49 feet 6 inches, although the controversy was as to a lot forming only one-third of the original lot. The effect of this statute is to vest the owner of what was the leasehold with a fee simple title. *Safe Dep. & Trust Co. v. Marburg,* 110 Md. 410, 417.

Where a person is put in possession as agent, all his acts of possession are to be referred to his agency, and are not to be regarded as hostile. *Walsh v. McIntyre,* 68 Md. 402, 418.

A disseisin cannot be committed by mistake, because the intention of the possessor to claim adversely is an essential ingredient of a disseisin. It is the claim of title that makes the possession of the holder of the land adverse. Consequently, if the claimant occupies the land under a mistaken impression that he holds title to it by the deed, but the deed, in fact, conveys other land than that in his possession, there is no

adverse possession of the land actually occupied. *Davis v. Furlow,* 27 Md. 536, 545; *R. R. Co. v. Hanken,* (Ia.) 19 L. R. A. N. S. 216, 217 and cases in note. *Jacobs v. Disharoon,* 113 Md. 92, 98.

THE POSSESSION MUST BE EXCLUSIVE.

The true owner must be entirely excluded in order that the possession may be adverse, for ordinarily the possession follows the legal title. So long as the owner remains in possession, one who claims even under color of title, can only be held to be in possession of so much of the land as he actually exclusively occupies. His color of title cannot draw any more land to it, because the owner is in possession of part of the land, with title to the whole. *Schlossnagle v. Kolb,* 97 Md. 285, 290, 292.

For the reason that possession must be *exclusive* to be adverse, one tenant in common is ordinarily considered not to hold adversely to his co-tenants, even though his possession be physically exclusive. Tenants in common are jointly seised of the entire estate, and each has an equal right of entry and possession, and the entry and possession of one co-tenant will be presumed to be in accordance with his title, and this presumption will hold until some notorious and unequivocal act of exclusion shall have occurred. The possession of one is the possession of the others also, and it will be necessary to prove an ouster to rebut this presumption. *Israel v. Israel,* 30 Md. 120, 125; *Hogan v. McMahon,* 115 Md. 195, 200, etc. *Cf. Dobbins v. Dobbins,* (N. C.) 10 L. R. A. N. S. 185; *Wickes v. Wickes,* 98 Md. 307, 329, 331.

Such an ouster occurs where one tenant in common conveys the whole estate in fee, and his grantee enters and claims and holds the exclusive possession, for here the conveyance and entry and possession must be deemed adverse to the title and possession of the co-tenants and amounts to a disseisin. *Rutter*

v. Small, 68 Md. 133, 137. This is so, because the conveyance of an estate in fee and an entry under that conveyance, coupled with possession, are open and unequivocal acts of ownership of such a nature as to give notice to the co-tenant that the entry and possession are hostile and adverse to his title. *Merryman v. Cumberland Paper Co.* 98 Md. 223, 225; cf. *Potomac Lodge v. Miller,* D. R. Oct. 8, 1912.

THE POSSESSION MUST BE CONTINUOUS.

By disseisin, the disseisor acquires an inchoate title in, and to, the property which is so far recognized at law, that he can transmit it to those in privity with him. The disseisor has the seisin or estate, the disseisee has merely the right or title of re-entry. *Wickes v. Wickes,* 98 Md. 307, 320. To become a good title, the possession must be continuous and uninterrupted during the statutory period. If adverse possession having all the qualities heretofore enumerated continues uninterruptedly for twenty years, it ripens into a good title. *Jacobs v. Disharoon,* 113 Md. 92, 99. The running of the statute not only affords a good defense to any action brought against the claimant, but furnishes him a good, affirmative title upon which he may bring and maintain ejectment against the holder of the paper title. *Hanson v. Johnson,* 62 Md. 25, 28.

A purchaser from such a claimant will be compelled to take the property, where title by adverse possession is shown. *Allen v. Williams,* 89 Md. 434, 436; *Erdman v. Corse,* 87 Md. 506, 510; *Rother v. Sharp St. Station,* 85 Md. 528, 530; *Cooke v. Councilman,* 109 Md. 622, 637; *Safe Dep. & Trust Co. v. Marburg,* 110 Md. 410, 417; *Arey v. Baer,* 112 Md. 541, 544; *Herbold v. Bldg. & Loan Assn.* 113 Md. 156, 162; *Potomac Lodge v. Miller,* D. R. Oct. 8, 1912.

Similarly, it is held that the Act of 1884, Ch. 502, Code, Art. 53, Sec. 26, confers upon the leaseholder, who has not paid or tendered, or from whom there has not been demanded,

any rent for a period of more than twenty years, an absolutely good, offensive and defensive fee simple title. There is a presumption that the rent has been extinguished by a deed from the reversioner to the leaseholder. *Safe Dep. & Trust Co. v. Marburg,* 110 Md. 410.

Title by adverse possession applies as well to leasehold estates for 99 years renewable forever, as to fee simple estates, and one who enters into adverse possession for the statutory period and pays the ground rent acquires good title to the leasehold by adverse possession. *Kolb v. Herman,* 82 Md. 339, 350. If, however, one who holds the leasehold estate in a lot of ground and occupies adversely for 20 years an adjoining strip, paying no rent therefor, he will acquire a fee simple title to the strip, although he has only a leasehold estate in the adjoining lot. *Hiss v. McCabe,* 45 Md. 77, 83.

The possession must be continuous for 20 years. It must not be interrupted or intermittent. Any interruption arrests the running of the Statute, and it only commences afresh when the possession is resumed. *Schlossnagle v. Kolb,* 97 Md. 285, 293.

Where different persons enter upon land in succession, each without title, the last possessor cannot tack the possession of his predecessor in possession to his own, so as to make a continuous possession. Upon every discontinuance of possession by the wrongdoer, the possession of the rightful owner is restored by operation of law. There is no privity or relation between the wrongdoers. *Baltimore v. Coates,* 85 Md. 531, 535..

Where, however, there is a privity of estate between the successive parties in possession, the rule is otherwise. A subsequent holder, claiming by will, conveyance, descent or distribution from a prior occupant, is entitled to tack his possession to that of his privy in estate and thus form a continuous possession, and if, by the addition of these successive occupations by privies in title or estate, a continuous occu-

pation of 20 years or more is made out, that will be sufficient. *Hanson v. Johnson,* 62 Md. 25, 31. Thus, at the death of the disseisor intestate, his possession will enure to the benefit of his heirs-at-law. *Wickes v. Wickes,* 98 Md. 307, 327.

When the statute once begins to run, it will continue to run and will not be suspended by the death of the owner or by the supervention of infancy, coverture or other disability, even though, if they had existed at the time of the accrual of the right, the starting of the running of the statute would have been prevented. *Gump v. Sibley,* 79 Md. 165, 169. The docketing of a suit to recover the land has, however, the same effect as a re-entry by the owner and suspends the running of the statute, even though it has already started. *Bank v. Lyles,* 10 G. & J. 326; *McKaig v. Piatt,* 34 Md. 249, 259. Where an action of ejectment has been brought but terminates by abatement and is not revived, it takes no time out of the act of limitations. *Young v. Marshall,* 4 Md. 362, 374.

The bringing of an action of ejectment is equivalent to an actual re-entry only when the action is brought within the time limited by statute for the right of re-entry. When, however, the action is not brought until after the time limited has expired, the disseisee must prove an actual entry upon the land within that time. *Wickes v. Wickes,* 98 Md. 307, 328. By such entry is meant an actual entry upon the land or some part thereof within the period of limitations, and it must evince that it is made with the clear and unequivocal intent to invade and challenge the right of the holder of the adverse possession and to retake possession. Thus, an entry by stealth under circumstances that the party claimed no right to enter, or an entry for other purposes than those connected with a right to enter, would not be sufficient to break the continuity of possession. *Ibid.* 328, 329.

PERSONS UNDER DISABILITY.

By 21 James I, Chap. 16, Sec. 1, as we have seen, the period of limitations is fixed at 20 years. Section 2, however, provides that certain classes of persons, under disability at the time the right accrues, shall have 10 years after the removal of the disability, within which to bring their action or, in the event of the death of such person under disability, such person's heirs shall have 10 years thereafter in which to sue. These persons under disability are:

Infants.—femes covert.—non-compotes mentis.—prisoners.—persons beyond the seas.

If, at the time that the right accrues, any of the above classes of persons were entitled thereto, the starting of the running of the statute was prevented, and such persons were entitled to wait for 10 years after the removal of the disability to bring their action. This proviso making an exception in favor of these classes of persons is strictly construed. If there are several disabilities co-existing at the time of the accrual of the right, the statute does not begin to run until the party has survived them all. That is to say, the party has the right to the benefit of the longest lasting of the disabilities. *Wickes v. Wickes,* 98 Md. 307, 326. If an infant is also a lunatic, and remains a lunatic after 21 years of age, he has until ten years after he regains his reason in which to bring his action, and not merely until 10 years after he attains his majority. *Dugan v. Gittings,* 3 Gill, 138, 160.

But the running of the statute cannot be prevented by cumulative disabilities. That is to say, if the time of the accrual of the right of action one disability, such as infancy, exists, the subsequent arising of another disability, such as coverture, will be disregarded. *Wickes v. Wickes,* 98 Md. 307, 326. The 10-year period will expire when the party attains

31 years, even though she may then be covert. If subsequent disabilities were to be regarded, the right of action might be saved for centuries. *Dugan v. Gittings,* 3 Gill, 138, 161.

Now, the propositions just laid down do not mean that the persons under disability are merely to have 10 years after the removal of the disability in which to sue. They, like persons *sui juris,* must have the full 20 years from the date of the accrual of their right, with the proviso that, if, at the time of such accrual, they were under disability, the running of 20 years from the time of such accrual shall not bar their right of action, unless at the same time, a period of 10 years from the time of removal of the disability has also elapsed. They, like persons *sui juris,* must have the full 20 years, but, if necessary, as much more time as may be required to give them 10 years after removal of the disability in which to sue. *Merryman v. Cumberland Paper Co.* 98 Md. 223, 227. Thus, where the disability ceases while the period of 20 years limitation is running, the 10 years given to the person who was subject to the disability, will run concurrently with the 20 years and not successively to it. *Wickes v. Wickes,* 98 Md. 307, 326.

Where a disability exists at the time when a right of entry on land accrues, and the person entitled dies during the disability, the heir has 10 years thereafter to make his entry, provided that 20 years have elapsed since his ancestor's right of entry accrued. In other words, he is entitled to 20 years from the origin of the title and 10 years from the death of the ancestor, but these limitations run concurrently, and not successively. *Baumeister v. Silver,* 98 Md. 418, 426. But no disability on the part of the heir can protract these periods or postpone the running of limitations. *Carter v. Woolford,* 71 Md. 283, 292.

In this State, by a person "beyond the seas" is understood a person out of the State. *Pancoast v. Addison,* 1 H. & J. 350, 356. And such a person would always have 10 years after

coming into this State within which to bring his action. This might mean that the Statute would never run against him. *Baumeister v. Silver,* 98 Md. 418.

The Act of 1894, Ch. 661, Code, Art. 57, Sec. 7, provided that "the period within which any suit or action may be brought under any Statute of Limitations in force in this State, shall not be extended because the plaintiff in such suit or action was, is or shall be: 1. *A feme covert.* 2. *Imprisoned.* 3. *Beyond the seas or out of the jurisdiction of the State, at the time of the accrual of the right of action.*

The effect of this statute is to leave lunatics and infants the only classes of persons entitled to the special privileges of 21 James I, Ch. 16, Sec. 2. Married women, prisoners and non-residents are by its terms treated as other persons *sui juris.*

This statute seems to have been intended to be retroactive in its operation, but that would have made it unconstitutional. The Court of Appeals, therefore, held that, as to married women, prisoners and non-residents to whom any cause of action accrued prior to its going into effect, June 1, 1894, the period of 10 years secured to them by the Statute of James was a vested right, and that they should have 10 years from that date in which to bring their suits, and that as to them the bar of the statute did not become operative until the expiration of 10 years from June 1, 1894, or until June 1, 1904. *Baumeister v. Silver,* 98 Md. 418, 427, etc; *Safe Dep. & Trust Co. v. Marburg,* 110 Md. 410, 415.

Limitations also do not run against the State of Maryland or the United States, nor can one acquire a valid title by adverse possession, no matter how long continued, to a public highway. *Ulman v. Charles St. Ave. Co.* 83 Md. 130, 144; *Cf. Baldwin v. Trimble,* 85 Md. 396, 403; *Arey v. Baer,* 112 Md. 541, 546; *Cushwa v. Williamsport,* 117 Md. 306, 319; *Cf. Canton Co. v. Baltimore,* 106 Md. 69, 93; *Krause v. El Paso* (Tex.), 14 L. R. A. N. S. 582. And a turnpike road is such a public high-

way. *Baltimore v. Knell,* 111 Md. 583, 599. The right of way of a railroad company is likewise such a public highway. *R. R. Co. v. Watson,* 74 Kan. 494; 14 L. R. A. N. S. 592.

Nor do they run against a beneficiary on behalf of his trustee under an express continuing trust. *Needles v. Martin,* 33 Md. 600, 619.

Limitations never begin to run until the accrual of the right of action to the party against whom the bar of the Statute is attempted to be set up. In the case of a deed to a religious corporation, void because of non-compliance with Art. 38 of the Declaration of Rights, entry thereunder is adverse to the grantor, and as the grantor could immediately disavow the deed and claim title, limitations at once begin to run from the date of the deed. *Gump v. Sibley,* 79 Md. 165, 169; *Regents v. Trustees,* 104 Md. 635, 640; *Dickerson v. Church,* 105 Md. 638, 639, 640; *Safe Dep. & Trust Co. v. Marburg,* 110 Md. 410, 417; *Phillips v. Insley,* 113 Md. 341, 347.

Limitations do not run against persons entitled to land upon the happening of a contingency, until the contingency occurs. *Kelso v. Stigar,* 75 Md. 376, 403. Nor against a reversioner or remainderman until the termination of the particular estate. This is so because a remainderman cannot maintain an ejectment until the termination of the particular estate. *Baumeister v. Silver,* 98 Md. 418, 424 and cases cited; *Stump v. Warfield,* 104 Md. 530, 551; *Crean v. McMahon,* 106 Md. 507, 525.

CHAPTER XXVI.

TITLE BY PRESCRIPTION FOR INCORPOREAL THINGS.

The adverse user of another's land, as by the enjoyment of an easement or other incorporeal right therein, will, if continued for the statutory period of limitation, usually create a corresponding easement, etc., in the land, and the title thus acquired is known as title by prescription.

The Statutes of Limitations do not usually apply to such user of rights, but, by analogy, the statutes applicable to the recovery of land are made applicable to such incorporeal rights. The result is that one who has exercised a right in another's land for such a statutory period adversely and under claim of right, is regarded as having such right. *Gulick v. Fisher,* 92 Md. 353, 358; *Waters v. Snouffer,* 88 Md. 391.

For example, it is a general rule that a right of easement is acquired by prescription by an adverse, exclusive and uninterrupted enjoyment for twenty years by the person claiming the easement, or by those under whom such person claims, and when such enjoyment is proved a grant of the easement to such person is presumed. *Day v. Allender,* 22 Md. 511, 529; but such user must be adverse and notorious, and not by way of license or permission. *Ross v. McGee,* 98 Md. 389, 397.

When a right by prescription is sought to be established, the onus of proving the prescription is on the party seeking to establish the right, and in the event of his failure to meet this burden no easement will be held to exist. *Moore v. Rayner,* 58 Md. 411, 422. The prescription when thus proved raises only a presumption of a grant, but by the great weight of

authority this presumption is conclusive and vests an absolute title in the claimant. *Dowling v. Hennings,* 20 Md. 179, 184; *Cf. Cadwalader v. Price,* 111 Md. 310, 319. Where this doctrine is applied in the case of adverse possession of land. See also *Sollers v. Sollers,* 77 Md. 148, 152.

As to the acquirement of a public highway by prescription, see *Canton Co. v. Baltimore,* 104 Md. 582.

CHAPTER XXVII.

TITLE BY ESTOPPEL.

In the broad sense of the term, *estoppel* is a bar which precludes a person from denying the truth of a fact which has in contemplation of law become settled:

By the acts and proceedings of judicial or legislative officials.

By the act of the party himself, either:

By his conventional writing; or, by representations, express or implied *in pais*. .

As stated in Coke on Littleton, 352a, estoppel is so called, "because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth."

Title by Estoppel is that which arises as a consequence of the application of the above principles to transactions affecting real estate.

There are three kinds of such estoppel:

ESTOPPEL BY RECORD.

ESTOPPEL BY DEED.

ESTOPPEL IN PAIS.

ESTOPPEL BY RECORD.

Estoppel by record is the preclusion to deny the truth of matters set forth in a record, whether judicial or legislative, and also to deny the facts adjudicated by a court of competent jurisdiction.

When a matter has once been adjudicated by a court of competent jurisdiction, the parties to the suit and their privies are estopped by the judgment or decree not only as to the precise

point in controversy, but upon all points essential to the finding of such judgment or decree. *Trayhern v. Colburn,* 66 Md. 277, 278. The effect of the decree of a Court of Equity is to estop all the parties to the cause from denying any material fact put in issue in the same and from disputing the title of any person in so far as it is dependent upon the decree and the sale and conveyance made in pursuance thereof. *Keene v. Van Reuth,* 48 Md. 184, 196.

It is a well-settled rule of law that a judgment of a court of competent jurisdiction offered as evidence of title cannot be impeached on any save jurisdictional grounds. When relied on as an estoppel, all those properly parties to it are not permitted to aver against it or offer evidence to controvert it. When a case has once been fairly tried and determined, the judgment rendered therein is final and conclusive touching the matter in controversy. Such a judgment cannot, of course, bind or affect the rights of third parties, strangers to the record. *Bank v. Thomas,* 37 Md. 246, 255, etc.; *Alexander v. Walter,* 8 Gill, 239, Brantly's note. This estoppel can, of course, not extend to matters as to which the judgment is silent, or of which the court had no jurisdiction. *Alvey v. Hartwig,* 106 Md. 254, 265.

ESTOPPEL BY DEED.

Estoppel by deed is a bar which precludes a party to a deed and his privies from asserting against the other party to the deed and his privies any right or title in derogation of the deed or from denying the truth of any material fact stated in it. Generally speaking, the effect of estoppel by deed is merely to bar the person estopped from asserting or denying title to the property, or from attempting to charge it with some trust or incumbrance.

The true principle of estoppel as applicable to deeds is to prevent circuity of action, and to compel parties to fulfill their

contracts; thus a party in a deed asserting a particular fact thereby inducing another to contract with him, cannot by a denial of that fact compel the other party to seek redress against his bad faith by suit, but the court will decide upon the rights of the parties without subjecting them to the delay and expense of new litigation. *Potomac Co. v. Smoot,* 108 Md. 54, 62, and cases cited.

Thus, a grantor will not be heard for the purpose of defeating the title of his grantee, to say that at the time of the conveyance he had no title, or that none passed by the deed, nor can he deny to the deed its full operation and effect as a conveyance. *Reese v. Reese,* 41 Md. 554, 558. Nor, on the other hand, can the grantee claim under a deed and at the same time repudiate the title thereby conveyed. *Kelso v. Stigar,* 75 Md. 376, 402. A grantor may be estopped:

BY THE RECITALS IN HIS DEED.

BY HIS EXPRESS COVENANTS THEREIN.

BY IMPLIED STATEMENTS OR COVENANTS THEREIN.

WHERE THE DEED OF THE GRANTOR RECITES THAT CERTAIN CONVEYANCES HAD BEEN MADE TO HIM, THAT RECITAL WILL BE BINDING BOTH ON HIM AND ON HIS GRANTEE.

A party is estopped not only to dispute his deed, but every fact that he has recited or admitted in his deed. *Lloyd v. Burgess,* 4 Gill, 187, 192; see the facts and decisions in *Jones v. Rose,* 96 Md. 483, 487—recited in *Safe Dep. & Trust Co. v. Marburg,* 110 Md. 410, 417; *Potomac Lodge v. Miller,* D. R. Oct. 8, 1912.

A GRANTOR IS ESTOPPED BY HIS EXPRESS COVENANTS IN HIS DEED.

A sub-lessor who agrees with the sub-lessee that the lot shall be subject only to the rent reserved in the sub-lease and who afterward acquires the original rent which is greater than the sub-rent, will be estopped to claim any greater rent than the sub-rent from the sub-lessee. *Lewis v. Kinniard,* 104 Md. 653,

661; *Connaughton v. Barnard,* 84 Md. 622; *Wahl v. Barroll,* 8 Gill, 239.

If a grantor having no title, a defective title or an estate less than that which he assumed to grant, conveys with warranty or covenants of like import, and subsequently acquires the title or estate which he purported to convey or perfects his title, such after acquired or perfected title will enure to the grantee or to his benefit by way of estoppel. This rule is adopted to prevent circuity of action, to prevent the necessity of the grantee first suing the grantor upon his covenant, and is the only case in which estoppel creates an affirmative, positive title, and not merely precludes the person estopped from setting up his own title. Such newly acquired interest enures to the benefit of the grantee as fully as if the grantor owned or possessed it at the time of making the conveyance. *Funk v. Newcomer,* 10 Md. 301, 316; *Jones v. Rose,* 96 Md. 483, 487; *Poultney v. Emerson,* 117 Md. 655.

Under a covenant of further assurance a vendor who has conveyed a bad title may be compelled to convey any title which he may thereafter acquire. *Cochran v. Pascault,* 54 Md. 1, 16. As to whether a covenant of special warranty operates to convey an after-acquired title the authorities seem to be somewhat in conflict.

ESTOPPELS BY IMPLIED COVENANTS OR STATEMENTS ARE SUCH AS ARISE FROM THE IMPLICATIONS OF LAW, AS TO THE LEGAL CONSEQUENCES OF THE EXECUTION AND DELIVERY OF THE DEED OR OF WHAT HAS BEEN STATED IN THE DEED.

For example, a mortgagor is estopped to deny that he had power to make the mortgage; his execution of it is an implied covenant that he had such power. *Warfield v. Ross,* 38 Md. 85, 90; *Stump v. Warfield,* 104 Md. 530, 546. A grantor who conveys land as binding on certain streets of which he owns the bed, impliedly covenants to keep such streets open for the

use of the grantee, and a dedication of the street to the public is held to result. *Clendenin v. Md. Cons. Co.* 86 Md. 80, 83; *Balto. City v. R. R. Co.* 88 Md. 427, 434. Such grantor is thereafter estopped to deny the right of the grantee or the public to use the land as a street.

ESTOPPEL IN PAIS.

Estoppel *in pais,* or equitable estoppel or estoppel by misrepresentations. When one by his acts, representations or admissions or by his silence when he ought to speak out, intentionally, or through culpable negligence, induces another to believe certain facts to exist and such other person relies and acts on such belief, so that he will be prejudiced if the former be permitted to deny the existence of such facts, then the former will be estopped to deny the existence of such facts. *Alexander v. Walter,* 8 Gill, 239, Brantly's Ed. 141, note; *Carmine v. Bowen,* 104 Md. 198, 203; *Carroll v. Manganese Steel Safe Co.* 111 Md. 252, 258; *Carroll Springs Dist. Co. v. Schneppe,* 111 Md. 420, 430.

To create an estoppel the following acts must concur:

A misrepresentation or concealment of a material fact.

Made with full knowledge of all the facts. Hambleton v. R. R. Co. 44 Md. 551, 559.

With the intention of misleading the other party. Homer v. Grosholz, 35 Md. 520, 526.

Such other party must have been ignorant of the facts. Reynolds v. Ins. Co. 34 Md. 280, 289, and

Such other party must have acted upon the faith of such representation or concealment, and must have been misled thereby to his prejudice. Hardy v. Bank, 51 Md. 562, 590; *Potomac Co. v. Smoot,* 108 Md. 54, 63.

Estoppel by silence can only arise where the silence would amount to a fraud, actual or constructive. *Carroll Springs Co. v. Schneppe,* 111 Md. 420, 431.

Illustrations: When one stands by and sees another lay out money on his land or on property to which he has a claim of title and does not give notice of it, he will not be allowed to set up that claim against the other. *Brownæ v. M. E. Church,* 37 Md. 108, 124; *Carmine v. Bowen, supra.*

Where, however, the same opportunity exists for both parties to learn of the title of the party who is claimed to be estopped by his acts, and the latter practices no concealment, there is no estoppel. *Tongue v. Nutwell,* 17 Md. 212, 230.

Where one person claiming title to land recognized title in another person, and stated to a purchaser of a part of the land from that other person that he was only a tenant by sufferance, and to other purchasers of other parts that he was only a life tenant, and that the title in fee was in such other person, it was held that these circumstances amounted to an estoppel *in pais* and were binding on the party so acting and his heirs. *Funk v. Newcomer,* 10 Md. 301, 316; *Carr v. McColgan,* 100 Md. 462, 478.

Where parties claiming title to land and those under whom they claim have stood by and acquiesced for a long period of time in the user of land for the purpose of a burial ground, they will not be permitted to assert a stale legal claim to the land, but will be held to be effectually estopped. *Boyce v. Kelbaugh,* 47 Md. 334, 337. Similarly, a party who supposes he has a good title to an estate and builds upon the land of another, who though fully apprised of his own rights gives no notice of his claim, cannot be deprived of the improvement so made by him without full compensation. *Union Hall Assn. v. Morrison,* 39 Md. 281, 290.

When the owner of land has done such acts *in pais* as amount to a dedication thereof; e. g., has laid it out as a public

street and induced the public to regard it as such, he will be estopped to deny that the public has the right to enjoy what is thus dedicated to its use or from revoking what he has declared by his acts. *McCormick v. Baltimore,* 45 Md, 512, 523. And while an encroachment on a public highway is a nuisance which can never grow by prescription into a private right, yet there are cases where, when the use of a highway has been totally abandoned by the public, and private rights have grown up in consequence of such abandonment, an equitable estoppel is created against the public to assert the right to the use of a highway. *Baldwin v. Trimble,* 85 Md. 396, 403, etc. *Arey v. Baer,* 112 Md. 541, 546; *Canton Co. v. Baltimore,* 106 Md. 69, 93; *Cf. Cushwa v. Williamsport,* 117 Md. 306, 318; *Peoria v. Bank,* 224 Ill. 43, 12 L. R. A. N. S. 686; *Krause v. El Paso,* (Tex.) 14 L. R. A. N. S. 582.

CHAPTER XXVII.

TITLE BY ACCRETION.

The owner of land binding upon a stream or body of water is entitled to such other land as may be added thereto by accretion—that is, by the gradual and imperceptible formation of land adjacent thereto by alluvial deposits or by the gradual and imperceptible recession of the waters—and this will be the case whether the stream is a navigable or a non-navigable stream. *R. R. Co. v. Baltimore,* 106 Md. 561, 564. The reason for this rule is that the owner of such land is subject to loss by the same means which may add to his territory, and, as he is without remedy for his loss in this way, he cannot be held accountable for his gain. *Linthicum v. Coan,* 64 Md. 439, 449, 452.

The Code, Art. 54, Sec. 47, confers upon the proprietor of the land bounding on any *navigable water* of this State, the title to all accretions to said land by the recession of the water heretofore or hereafter formed or made by natural causes or otherwise, in like manner and to like extent as may or can be claimed by the proprietor of land bounding on water not navigable. Sec. 48 confers on such proprietor the exclusive right of making improvements into the waters in front of said land.

Shively v. Bowlby, 152 U. S. 1, 23, 38 L. Ed. 331, 430, speaks of "navigable" in this sense as the equivalent of "tidal." The provisions of Sec. 47 appear to be declaratory of the common law. *Ibid.* 35, L. Ed. 344. Where federal jurisdiction is involved, and in some of the states, "navigable" is here understood to mean navigable, whether the tide actually ebbs or flows or not. *Shively v. Bowlby, supra; McGilvra v. Ross,* 215 U. S. 70.

Sec. 48 further provides that such improvements and accretions shall pass to the successive owners of the land to which they are attached as incidents to their respective estates. But no such improvement shall be so made as to interfere with navigation. No patent shall be issued so as to effect these rights of riparian proprietors and no patent shall hereafter issue for land covered by navigable waters. (Sec. 49.) The effect of these provisions is to protect the riparian owner in his rights to extend and improve by prohibiting the issue of a patent, but until he does make the improvements, he has no interest in the land under the water upon which his land borders except the right of accretion and the right to extend and improve. *R. R. Co. v. Baltimore,* 106 Md. 561, 567.

The Act of 1745, Ch. 9, incorporated the original Baltimore Town. By Sec. 10, the right was conferred upon lot owners fronting on the harbor to fill up the adjacent waters and improve the same to the limit fixed by the city authorities—that is to what is known as the Port Warden's Line. *Tome Inst. v. Crothers,* 89 Md. 569, 584. This right to extend and improve is a franchise, a *quasi* property of which the lot-owner cannot be deprived without his consent. *R. R. Co. v. Chase,* 43 Md. 23, 36; *Tome Inst. v. Crothers, supra,* 580. The right to improve was designed to embrace only structural improvements, such as wharves, piers, warehouses, or the filling out from the shore and reclaiming the land from the inundation of the water. It makes no difference, however, which of these forms the improvement takes. *R. R. Co. v. Baltimore,* 106 Md. 561, 570.

The improvements, when once made, are the fee simple property of the lot-owner making them, the State, as an inducement to the making of such improvements, having surrendered its right as sovereign to all land below the high-water mark. These improvements become statutory additions to the original lots, and are held by the same title. They are the

original lots made larger. *Tome Inst. v. Crothers,* 89 Md. 569, 584. The right of the riparian owner to such improvements necessarily carries with it the power of alienation thereof either in connection with, or independently of, the land to which such improvements were attached. *Goodsell v. Lawson,* 42 Md. 373; *R. R. Co. v. Baltimore,* 106 Md. 561, 568. This right of the owner to improve out is confined to the front of his lot, and must be within the sides or outlines of the lot extended to the Port Warden's Line. Therefore, where some person other than the owner of the lot fills in and improves in front of the lot, without the consent of the owner, the improvements will belong to the owner. *Baltimore v. Hospital,* 48 Md. 419, 422.

The owner of a perpetual leasehold interest in the lot is regarded as the proprietor of such lot to the extent that he has the right to acquire land below high-water mark by making extensions. The fast land which he should make in this way would belong to himself. It may not be in all respects entirely accurate to say that he holds it by the same title by which he held the original lots. That is, the quantity of the estate is not the same. Yet he has a right to this land because he was the proprietor of the original lots. That proprietorship was the origin and support of his right. *Tome Inst. v. Davis,* 87 Md. 591, 605.

Frequently the water front is irregular, and these extensions from various lots would conflict with one another. Such a situation gives rise to difficult questions. *Classen v. Chesapeake Co.* 81 Md. 258, 267. The rule is that the right to extend must be exercised within the side lines of the lot at right angles to a straight shore, or, if the shore be concave, within converging side lines which proportionately divide the tide-water shore among such owners. *Baltimore v. Balto. & Phila. S. Co.* 104 Md. 498.

CHAPTER XXVIII.

TITLE BY ABANDONMENT.

Easements and other incorporeal hereditaments may be lost by abandonment, but the effect of such abandonment is not to vest the title thereto in any other person, but simply to disentitle the owner to claim the easement or other incorporeal hereditaments. Of course, such right may be yielded up by deed. But an easement acquired by prescription for twenty years may be lost by an abandonment or discontinuance of its use for more than twenty years. *Cox v. Forrest,* 60 Md. 74, 81. Although mere non-user of an easement even for more than twenty years will not afford conclusive evidence of its abandonment, such non-user for the prescriptive period united with an adverse user of the servient estate inconsistent with the existence of the easement will extinguish it. *Canton Co. v Baltimore,* 106 Md. 69, 100; *Trimble v. King,* (Ky.), 22 L. R. A. N. S. 889, note.

Indeed, a party entitled to an easement may abandon and extinguish the same by acts *in pais,* without deed or other writing, without regard to the method of its creation. *Duval v. Becker,* 81 Md. 537, 550. The mere ceaser of use for a long time would be a strong fact tending to show an intention to abandon the right. *Ibid; Canton Co. v. R. R. Co.* 99 Md. 202, 218. The act or acts *in pais* relied on, however, to effect an abandonment must be of a decisive character. A mere declaration of an intention to abandon will not alone be sufficient; it must be accompanied by some affirmative act, indicating an intention to abandon. *Canton Co. v. R. R. Co.* 99 Md. 202, 219. An actual ceaser of the use, coupled with any act clearly in-

dicative of an intention to abandon the right, would have the same effect as an express release of the easement, without any reference whatever to time. *Glenn v. Davis,* 35 Md. 208, 217; *Canton Co. v. Baltimore,* 106 Md. 69, 100.

As to whether the act of the party entitled to the easement amounts to an abandonment or not depends upon the intention with which it is done, and that is a question for the consideration of the jury. If, for example, a party entitled to a right of way over the land of another agrees or consents that the latter shall erect a house or a permanent wall across the way, which would necessarily obstruct the enjoyment of the easement, and such building or wall is erected accordingly, that would certainly amount to proof of an abandonment of the easement. Such an obstruction, being permanent in its nature, would, of necessity, so far as the party agreeing to the erection is concerned, terminate the enjoyment of the easement, and thus extinguish the right itself. But if the party be authorized to raise the obstructions complained of by mere parol license, and such license be executed before revocation, and the obstruction be only temporary in duration or partial in effect, the easement is only suspended or modified for the time of the duration of the obstructions raised in pursuance of the license; and the license being only for a specific act, and being, except to the extent that it has been actually executed, countermandable, the licensee cannot erect another obstruction of the same or of a different character without a new license. Consequently, such temporary or partial obstructions do not destroy or work an extinguishment of the right. In such case, after the removal of the obstructions, the right to use the easement as formerly is fully restored.

But a party having once given his free consent to forego the use of the easement, either temporarily or permanently, and suffered other persons to act upon the faith of the agreement or consent, and to incur expense in doing the very act to which

his consent was given, it is then too late for him or those claiming under him to retract such consent, or throw on those relying upon his good faith the burden of restoring things to their former state and condition. This principle is now well established in courts of law as well as in equity. *Vogler v. Geiss,* 51 Md. 407, 410.

As we have seen, this doctrine applies to a public highway against the public. *Baldwin v. Trimble,* 85 Md. 396, 403.

The question, then, as to whether there has been an abandonment or not is usually one of fact, to be determined by the circumstances in each case, and a mere non-user, without any affirmative act on the part of the owner of the easement, for a long time, but less than 20 years, as prescribed in the Statute of Limitations, is not sufficient. Abandonment is a relinquishment or surrender of rights by one person to another, and includes both the *intention* to abandon and the *external act* by which the *intention* is carried into effect. *Canton Co. v. R. R. Co.* 99 Md. 202, 219.

In the case of a railroad company, a change of route is strong evidence of an abandonment of the old way, and in some cases has been held to amount to an abandonment. If the change of route, however, is but temporary, or is not, in fact, intended as an abandonment of the old route, but to secure additional accommodation for its business, or there are other acts showing a want of intention to abandon, there is no good reason why as a matter of law it should be so regarded. *Trimble v. King,* (Ky.) 22 L. R. A. N. S. 881, note.

CHAPTER XXIX.

TITLE BY DEDICATION.

Dedication is the setting apart of land for the public use. In order that such setting apart may be complete and conclusive, it must, of course, conclude the owner of the land who has thus set it apart, and it must have been accepted by the proper public authorities or by a general public user. Generally speaking, there are two kinds of dedication:

STATUTORY DEDICATION.

COMMON LAW DEDICATION.

STATUTORY DEDICATION.

Until April 6, 1908, there was probably no such thing as statutory dedication in the State of Maryland. Until that date, there was no statute in this State regulating this matter. Acts 1908, Ch. 582, 583; 1912, Ch. 659. As a matter of general information, we should know that in very many states of this country there are statutes regulating this subject, and a statutory dedication is one made in accordance with the provisions of such a statute.

The general rule is that, in order to constitute a valid statutory dedication, the provisions of the statute must be substantially complied with, and such acts as it requires must be performed substantially in the manner prescribed by the legislature. This is necessary in order to give to the dedication validity as a purely statutory dedication, but in many instances a dedication, invalid as a statutory dedication, will be a good common law dedication. 2 Tiffany Real Property, Sec. 422. See Act 1908, Ch. 582, 583; 1912, Ch. 659; *Dineen v. Corp. for Relief of Widows,* 114 Md. 589, 591, 596.

COMMON LAW DEDICATION.

Common law dedications may be sub-divided into two classes: *Express Dedications, Implied Dedications.*

In both express and implied common law dedications, it is necessary that there should be an appropriation of land by the owner to public use, in the one case by some express manifestation of his purpose to devote the land to public use; in the other, by some act or course of conduct from which the law will imply such an intent.

If a landowner, by express grant to a city, should add a strip of land to the width of a street or road, there would be a valid dedication, and it would rest upon an express grant.

No precise form of words is needed to constitute an express dedication; any language indicating the intent to set apart the land for public use will be sufficient. Elliott on Roads & Streets, Sec. 121.

As we have already seen, in order that there may be a valid grant, there must be a grantee *in esse* competent to take. A dedication differs from a grant in the very material particular that there may be no grantee *in esse* at the time of the dedication to give it effect. An appropriation or dedication of property to public uses is an exception to the general rule requiring a particular grantee. The public is an ever-existing grantee, capable of taking dedications for public uses, and its uses are a sufficient consideration to support them. *Parlett v. Clark,* 9 Cranch, 292, 331. Thus, it is not necessary that a municipal corporation be in existence at the time of the dedication, and when it comes into existence whether by incorporation of by extending the corporate limits, the right to take advantage of the dedication in behalf of the public will rest therein. *Cushwa v. Williamsport,* 117 Md. 306, 311.

Public easements, created by dedication, must be distinguished from private easements. The former differs from the latter in that there is no dominant estate to which they are

appurtenant; they belong to the public, and each member thereof, and are, therefore, in gross. The incidents and qualities of public easements, largely owing to the intervention of the state or of municipalities or other public authorities representing the public, will be found to differ in important respects from the incidents of private easements. For illustration, see *Dineen v. Corp. for Relief of Widows,* 114 Md. 589.

FOR WHAT PUBLIC USES DEDICATION MAY BE MADE.

Land may be dedicated to the public for use as highways, streets or alleys. Although formerly doubted, it is now well-settled that a road or street which is a mere *cul de sac* may be dedicated to the public use in the same manner as a thoroughfare. *Baltimore v. Broumel,* 86 Md. 153, 155, 157. There is no substantial difference between the modes of dedicating a public street and a public alley. *Van Witsen v. Gutman,* 79 Md. 405, 408.

Land may likewise be dedicated for use as a burial ground. Boyce v. Kelbaugh, 47 Md. 334, 336.

For use as parks, squares and public commons. Harbor Co. v. Smith, 85 Md. 537; *Canton Co. v. Baltimore,* 106 Md. 69, 11 L. R. A. N. S. 129.

It has also been held that dedications may be made for school purposes, because such uses are public uses.

The owner of the soil can dedicate the same to the public for use as a landing place or wharf. Cal. Nav. & Imp. Co. v. Transp. Co. 126 Cal. 433, 46 L. R. A. 825, 827. But the right to use such a landing place for the deposit of property in transit cannot be so acquired. *Thomas v. Ford,* 63 Md. 346, 352.

The owner of a sewer can dedicate the same to public use. Kranz v. Baltimore, 64 Md. 491, 497.

There can, however, be no dedication in any case where the use is not intended for the whole public, and, in addition, it

must be a use which the whole public might possibly enjoy. *Baltimore v. Fear,* 82 Md. 246, 256, 257.

Everyone can use a highway or park or commons, and, therefore, without question land may be dedicated for each of these purposes. On the other hand, it is held that the right to fish in private waters cannot be acquired by dedication, nor can fishermen acquire by dedication the right to erect huts on the shore of a stream for use during the fishing season. The right to float logs down a stream in time of flood, thus endangering dams and riparian property, cannot be a public use. All of these illustrations are of uses, the enjoyment of which by some is exclusive or destructive of the rights of others. *Thomas v. Ford,* 63 Md. 346, 352. In this case, the defendant had encumbered the land of the plaintiff along the shore of the Patuxent river by piling a large quantity of cordwood thereon, claiming the right to do so as a consequence of the dedication by the plaintiff of this land to the use of the public to make deposits of articles of freight thereon. It was held that from the very nature of the user relied on, it must be confined to but few individuals, and that this fact negatived the idea of the existence of the right in the general public. Each individual member of the public could not enjoy it, for the first occupier would have the right to appropriate the entire space to himself, and no one could question his right in so doing. While he remained in possession all the rest of the public would be excluded. Such user rather denotes title and the right of exclusive enjoyment than the enjoyment of a public easement.

Dedications of land can be made only by the owner thereof. The owner of the equitable estate may make an effective dedication in all cases where the full beneficial interest is in him, even though the naked legal estate is in a trustee. *Cincinnati v. White,* 6 Peters, 431, 440, etc. Under certain circumstances, trustees (for example, trustees under deeds of trust for the benefit of creditors) are regarded as owners of land to such an

extent as to be able to dedicate it to public use. *Pitts v. Baltimore,* 73 Md. 326, 334, etc. In *Broumel v. White,* 87 Md. 521, 523, we have the case of receivers, appointed to make sale of property, making a dedication of part thereof.

It is apparent, on the other hand, that one of several tenants in common cannot make a dedication binding upon his cotenants, nor, similarly, can a tenant dedicate the land in which he has a mere term, so as to bind his landlord. As to whether a tenant can dedicate for the period of his term, see Harvard Law Review for December, 1907. *Kiernan v. Jersey City* (N. J.), 31 L. R. A. 1023, note, "Dedication of land in which third persons have an interest."

ESTATE CREATED BY DEDICATION.

The presumption, in cases where there is no express definition of the estate granted, will be that an easement only is created. The public, in cases of implied dedication, will acquire such an estate only as is adequate for the public use, and such use can be assured just as fully and effectually by an easement as by an estate in fee. The public use is the measure of the estate granted. The title to the fee in the land granted, subject to the dedication, remains in the owner of the land. Elliott on Roads & Streets, Sec. 149. Upon the legal abandonment of other cessation of the public use, the landowner once again becomes entitled to the land in fee simple, free from the public easement. *R. R. Co. v. Gould,* 67 Md. 60, 63; *Canton Co. v. Baltimore,* 106 Md. 69, 11 L. R. A. N. S. 129; *Weyler v. Gibson,* 110 Md. 636, 652.

CONDITIONS IMPOSED BY THE DEDICATOR.

It is well settled that in dedicating land to the public use, the dedicator may impose such reasonable conditions, restrictions and limitations as he may see fit, and in order to bring about a binding dedication, such conditions must be fully com-

plied with. For example, Col. John Eager Howard had laid out certain land as a public square for the use of the State, in the event of the removal of the seat of government from Annapolis to Baltimore. The seat of government was never so removed. This conditional dedication, therefore, never became effective. *Howard v. Rogers,* 4 H. & J. 278, as explained in *White v. Flannigan,* 1 Md. 525, 542, and *Harbor Co. v. Smith,* 85 Md. 537, 546; *Cf. Canton Co. v. Baltimore,* 106 Md. 69, 91, 99. Such conditions, to be valid, however, must not be illegal or contrary to public policy. As we have already seen, the use must be for the benefit of the whole public. There can, therefore, be no valid dedication to any private person or to any limited number of persons. *Neal v. Hopkins,* 87 Md. 19, 30. Nor for any particular portion of the public. The dedication must be for the benefit of the whole public. *Baltimore v. Fear,* 82 Md. 246, 257.

Thus, there can be no such thing as a dedication of land to a railroad company, although a quasi public corporation. *R. R. Co. v. Whitman,* 155 Ill. 514, 28 L. R. A. 612, 617. Nor, it is generally held, can there be a dedication limited as to the time of its duration.

DEDICATION; HOW ACCOMPLISHED.

A dedication is always in the nature of an offer, because to be complete it must be actually or constructively accepted. Dedication is made up of two elements—*The act of dedication,* and *The intention to dedicate* (*animus dedicandi*). The act by itself may be equivocal, as the mere opening of a road without indicating for what purpose, or it may be purely negative, as the mere suffering or permitting the public to use one's land. Such acts, however, when accompanied by the intention to dedicate become clear. Likewise the mere *animus dedicandi,* is not sufficient. It must be accompanied by some act or acts in furtherance of such intention.

Dedication is sometimes said to be purely a question of intention. Yet it must be manifested by some act or acts of the owner of the land clearly indicating such intention. *R. R. Co. v. Con. Coal Co.* 95 Md. 630, 634. This intention must be clearly and unequivocally manifested. The strongest, clearest and most convincing proof of intention will be required to establish a dedication. *Harbor Co. v. Smith,* 85 Md. 537, 542; *Canton Co. v. Baltimore,* 106 Md. 69, 83, 98, 11 L. R. A. N. S. 129; *Stover v. Steffey,* 115 Md. 524, 530. The intention, nevertheless, which the law contemplates is not an intention concealed in the mind of the landowner, but that which is indicated by his statements and acts.

Where the landowner. in the deed which is relied on as working a dedication, expressly states that he does not intend a dedication, that is not hiding his intention in his breast, but openly proclaiming his intention not to dedicate, and no dedication will, therefore, result. *Baltimore v. Fear,* 82 Md. 246, 257.

FORM OF COMMON LAW DEDICATION.

There is no particular form or ceremony necessary in the dedication of land to public use. All that is required is the assent of the owner of the land and the fact of its being used for the purposes intended by the appropriation. This assent need not be expressed in any particular manner, but it may be implied from the conduct of the owner of the land. No conveyance of land is necessary, nor need there be any grantee *in esse* to take the title, but if the owner of the land has done such acts *in pais* as amount to a dedication, he is thereby estopped from denying that the public has a right to enjoy what is thus dedicated to their use, or from revoking what he has declared by his acts. *R. R. Co. v. Con. Coal Co.* 95 Md. 630, 634.

As we have already seen, this intention to dedicate, which is so fundamentally important, must be either expressed or

implied. Such intention may be formally expressed or implied in a deed or other instrument or writing, or even orally. The most usual and important class of dedication, however, it that in which the *animus dedicandi* is implied or presumed from certain acts of the landowner. These implied or presumptive dedications are of two kinds. In one of these kinds, the question is dependent upon the facts and circumstances which are relied on as establishing the intent to dedicate. The other kind includes dedications arising by estoppel.

In the first class of cases, the question is essentially one of fact, although, of course, the question as to what constitutes dedication is one of law. For example, if an owner of land opens a highway through his land and throws it open to public use, that is a manifestation of his intention to dedicate the highway to public use. If the owner of the soil throws open a passage, and neither marks by any visible distinction that he means to preserve his right over it, nor excludes persons from passing through it by positive prohibition, he shall be presumed to have dedicated it to the public. *Rex v. Lloyd,* 1 Campbell, 260. Such user need not continue for 20 years, nor for any definite length of time. The longer the user, however, the clearer the intention to dedicate.

The second class of cases, however, where the dedication is held to arise from the estoppel of the owner, arising out of his acts, presents the most difficult and for us the most important questions. Indeed, it has been found that it is very difficult to lay down any general rule. Each individual case must be decided by itself, taking into consideration all the attendant circumstances, the condition of the respective parties and the acts, declarations and intentions of the landowner as manifested by his conduct. For, as we have seen, it is largely on the doctrine of estoppel *in pais* that the principle of implied dedication rests. *Baltimore v. Frick,* 82 Md. 77, 83.

If the owner of a piece of land lays it out in lots and streets and sells lots calling to bind on such streets, he thereby dedicates the streets so laid out to public use. This rule is founded upon the doctrine of implied covenants, and the dedication will be held to be co-extensive with the right of way acquired as an easement by the purchaser. *Richardson v. Davis,* 91 Md. 390, 396. It is upon the implied covenant in the grant to him that the dedication to the public rests, and such dedication must necessarily be measured by the limits of the right he has acquired by virtue of his grant. *Hawley v. Baltimore,* 33 Md. 270, 280; *Stover v. Steffey,* 115 Md. 524, 530. Under such circumstances, the grantor and his heirs are estopped from denying that there are such streets or ways. *White v. Flannigan,* 1 Md. 525, 541. The dedication to the public springs from, and is supported by, the title conveyed to the grantee. The public acquires a right of way at the time of the execution of the deed to the grantee, because the grantor then declared his assent to the land becoming a public street. *Flersheim v. Baltimore,* 85 Md. 489, 494.

Private Right of Way: The general rule is that when the owner of land intersected by an established private right of way of his own conveys a lot described as extending to the centre of the way, the grantee takes a fee to the centre and the grantor owns the other half in fee, while the grantee by implication, takes a right of way over the half retained by the grantor subject to a like right in the latter over the half conveyed. *Dineen v. Corp. for Relief of Widows,* 114 Md. 589, 596; *Talbert v. Mason* (Ia.), 14 L. R. A. N. S. 878, note.

Dedication of this kind now being considered will occur also where a street is designated upon a plat made by some competent authority, or by the landowner himself, as passing over certain lands, and the owner subsequently conveys lots fronting or binding on such street, the landowner remaining the owner of the fee or bed of the street. In such case, like-

wise the sale or conveyance of lots so bounded implies a grant or covenant to the purchaser that the street thus indicated and called for, shall be and forever remain, open to the use of the public, free from all claim or interference of the landowner therein inconsistent with such use. *Pitts v. Baltimore,* 73 Md. 326, 332. The map or plat on which the street or public way may be laid out need not necessarily be made a part of, or be referred to by, the deed or lease or other conveyance of the land under which the dedication is claimed to be made. The settled rule is that if the lot is described as fronting or binding on a street which is designated on a public map or private plat, such description and calling for an unopened street raises an implied covenant that such right of way exists and has been dedicated. *Baltimore v. Frick,* 82 Md. 77, 83.

A distinction is often made between the principles applicable to the dedication of streets affording easements directly profitable and necessary to the use of lots, and parks that are intended for public recreation and enjoyment, and are only indirectly beneficial to lots. Such parks are generally separated from the lots conveyed by a contemplated street which forms one of the boundary lines of the lot conveyed. If, therefore, the proposed park is merely laid out on the plat and such plat is merely referred to in the deed of the lots and no specific reference is made to the park itself in the deed, it will not necessarily follow that such reference will work a dedication in such a case. *Stovey v. Steffey,* 115 Md. 524, 533. Most convincing evidence will be required that the plat referred to in the deeds had the alleged park designated upon it as a public park. *Canton Co. v. Baltimore,* 106 Md. 69, 86, 11 L. R. A. N. S. 129. There is no implied covenant that the remaining lots on the same plat shall remain as thereon designated and that no change in their size will be made. *Herold v. Real Estate Co.* (N. J.) 14 L. R. A. N. S. 1067 and note.

It is thus apparent, without the citation of the numerous other Maryland authorities, that the dedication of streets and highways and parks by a conveyance of lots as bounding thereon, or by reference to a plat upon which such streets and highways or parks are laid out, grows out of, is dependent upon, and is measured by the rights of the grantee in such conveyance. Important consequences grow out of this doctrine. In the first place, even if an owner of land should divide it into lots, streets and alleys, and should place a plat of them on record, but has sold none of the lots, there would be no dedication. *Harbor Co. v. Smith,* 85 Md. 537, 545. The land, notwithstanding these acts, still remains his own, and neither any other individual nor the public has any right to interfere with such use of it, as any man may lawfully make of his own. *Clendenin v. Md. Cons. Co.* 86 Md. 80, 83. As soon, however, as a sale of a single lot is made calling for such street or referring to such plat, the implied covenant in favor of the grantee and the estoppel of the grantor arises, and the dedication becomes complete. *Cf. Tinges v. Baltimore,* 51 Md. 600, 610.

As we shall hereafter see, in order that a dedication may be irrevocable, it must be accepted by the public. Until so accepted, as already stated, it has its origin in, and is entirely dependent upon, the implied covenant in favor of the grantee. So long as there remains such a grantee, the dedication persists, even without acceptance, by the public. If, however, at any time there ceases to be any such grantee, inasmuch as the covenant exists for his benefit, the dedication will likewise come to an end. Thus, if the title to the whole land, including the bed of the street, is vested in one person, there is then no such grantee and there is no longer any dedication. *Clendenin v. Md. Cons. Co.* 86 Md. 80, 84. Under such circumstances, the dedication is cancelled and extinguished. *Story v. Ulman,* 88 Md. 244, 247.

This doctrine of implied covenants does not create a right of way over all the lands of the vendor in the bed of the street. The dedication is limited, as we have seen, by the extent of the rights acquired by the purchasers. This right of way must be contiguous to the lot sold, and there must be the same limitation upon the amount of land held to be dedicated. The Maryland doctrine is that the purchaser of a lot calling to bind on an unopened street (and, through him, the public), is entitled to a right of way over it, if it is on the land of the vendor, to its full extent and dimensions, only until it reaches some other street or public way. *Hawley v. Baltimore,* 33 Md. 270, 280; *Stovey v. Steffey,* 115 Md. 524, 531. The street which limits the extent of the dedication need not be an open street. Any street, whether public or private, and whether open and used or not, will suffice to limit the extent of the dedication. *Baltimore v. Frick,* 82 Md. 77, 85; *Flersheim v. Baltimore,* 85 Md. 489, 493. A twenty-foot alley does not, however, appear to be such a street or way as will serve to limit the extent of the dedication in accordance with the rule just laid down. *Tinges v. Baltimore,* 51 Md. 600, 610. This doctrine of the limitation of the land dedicated is held to apply to the case of a park separated from the lots sold by other lots and streets. *Stover v. Steffey,* 115 Md. 524, 533.

CONVEYANCE NEED NOT BE UPON A VALUABLE CONSIDERATION.

The grantee of land described as bounding upon an unopened street need not have obtained his deed for a valuable consideration. The covenant is implied solely for the reason that the parties are held to have intended that there should be a street. If the grantor intended that the grantee should have the benefit of a street, and the grantee intended to acquire that benefit, the law will raise a covenant to that effect. The words of the deed mean the same thing whether the consideration is valuable or merely nominal. The construction of the deed

which gives rise to the covenant is reached from the language employed with relation to the street, and not from any consideration of the nature of the consideration. A gift, therefore, of land so described will work a dedication. *Flersheim v. Baltimore,* 85 Md. 489, 492.

As a result of all the Maryland cases it may be stated that the following three requisites must always concur in order that there may occur a dedication arising out of an implied covenant:

There must be a street designated on a plat made or adopted by the owner himself, as passing over his lands, or the owner must actually lay his land out in lots and streets.

A subsequent conveyance by him of lots binding on such street.

The retention of the fee in the bed of the street by the owner at the time of the conveyance. .Baltimore v. R. R. Co. 88 Md. 427, 434; *Bloede v. Baltimore,* 115 Md. 594, 595, 601.

The first two of these requisites have already been considered by us. The third is also important.

In order that there may be a dedication of this character, the owner of the land, while disposing of the lots bounding on the street claimed to be dedicated, must retain in himself title to the fee of the bed thereof. In *Baltimore v. R. R. Co. supra,* the deed which was relied on as working the dedication, conveyed not merely the lot as bounding on the street claimed to be dedicated, but also one-half of the bed thereof. The vendor, therefore, retained title to only one-half of the bed. The only dedication, if any, that could arise would be of the whole of the adjacent street; but the deed by conveying one-half thereof in fee, rendered that impossible. It was held, therefore, that there could have been no intention to dedicate, and, therefore, no dedication.

At the very outset of our treatment of this subject, emphasis was laid on the rule that dedication is essentially a question of intention, and that without the presence of the *animus dedicandi,* there can be no dedication. It was decided in *Baltimore v. Fear,* 82 Md. 246, that where the grantor, in his deed, says in so many words that he does not intend a dedication, none will result. Other acts of the grantor short of such express statement will sometimes operate to rebut the presumption of an intention to dedicate, which ordinarily arises wherever land is conveyed as binding on, or in terms of, streets. The implication of such a covenant may be rebutted in many ways. If the call for the street was made merely for the purpose of convenient description of boundaries, as in case of a partition of an estate among heirs, it has been held that no intention to dedicate to the public use can be held to exist. *Pitts v. Baltimore,* 73 Md. 326, 333.

In *Glenn v. Baltimore,* 67 Md. 390, 400, the lease, relied on as working a dedication, contained a provision requiring the lessors to pay any assessments for the opening of the streets. The lessors continued to pay taxes on the bed of the alleged street. These and other facts were held to rebut the presumption of an intention to dedicate.

McCormick v. Baltimore, 45 Md. 512, 527, and *Baltimore v. White,* 62 Md. 362, 367, were each cases of partition. In the first case, temporary ways were provided for along the center of the alleged streets until other ways were opened. This provision clearly negatived any idea of dedication. The ways were to be merely temporary. In White's case, the partition deeds provided that each of the parties thereto should have free ingress and egress through all alleys and streets laid down upon a certain plat. If a dedication had been intended, no such provision would have been necessary. No dedication was, therefore, intended. *Bloede v. Baltimore,* 115 Md. 594, 603.

After there has been a complete, valid dedication, in the absence of any condition, the public is under no obligation to use or accept the dedicated street or highway within any definite period of time. *McCormick v. Baltimore,* 45 Md. 512, 523; *Baltimore v. Broumel,* 86 Md. 153, 159. Mere non-user of such street for no matter how long a time continued will not of itself amount to an abandonment by the public of the street. *Richardson v. Davis,* 91 Md. 390, 396. Even though the bed of the street may have been occupied by private parties, this will not be held sufficient to constitute an abandonment.

In *Baltimore v. Frick,* 82 Md. 77, 80, the bed of the dedicated street had been from time to time dug up for clay for making bricks, and a brick-kiln erected on part of the bed thereof; yet the original dedication was held not to be nullified thereby. The fencing in of the dedicated street and its use as a pasture for twenty-three years cannot affect the dedication. *Flersheim v. Baltimore,* 85 Md. 489, 494. Indeed, it is generally held that the common right of highway cannot be lost by the attempted adverse possession of a private individual. To protect highways from encroachments that it is the business of no one to resist, requires that the public be allowed to resume its rights at any distance of time, disregarding any loss to those who have appropriated and erected improvements upon the public domain, or to the more innocent purchasers from them. No prescriptive right to maintain a nuisance in a public highway can arise. *Ulman v. Charles St. Ave. Co.* 83 Md. 130, 144, 145; *Baldwin v. Trimble,* 85 Md. 396, 402, 403; *Cf. Canton Co. v. Baltimore,* 106 Md. 69, 93, 99, 100; 11 L. R. A. N. S. 129.

While, however, according to the great weight of authority, the rights of the public in a dedicated street or park cannot be lost by mere non-user, or by adverse possession, yet cases may arise where, there having been an actual and notorious aban-

donment of the highway by the public, justice requires that an equitable estoppel shall be raised even against the public in favor of individuals. Such a case is that of *Baldwin v. Trimble,* 85 Md. 396, 403.

ACCEPTANCE.

As we have already seen, under certain circumstances, as for example, where no rights of third parties have accrued or, if accrued, have been extinguished by acquisition by the owner of the land, a dedication may be revoked. *Clendenin v. Md. Cons. Co.* 86 Md. 80. But this can occur only where there has been no acceptance of the dedication by the public. Such acceptance, when made, absolutely precludes the revocation of the dedication by the landowner. *New Windsor v. Stockdale,* 95 Md. 96, 212; *Canton Co. v. Baltimore,* 106 Md. 69, 84, 11 L. R. A. N. S., 129.

In order, however, that dedicated property may become public property in the sense that the municipality or local district may exact ownership or control over it and be responsible for it and its maintenance as a public street or park, etc., there must be an acceptance of the dedication, and this acceptance must be by the proper authorized local authorities. *Kennedy v. Cumberland,* 65 Md. 514, 521; *Valentine v. Hagerstown,* 86 Md. 486, 488. If this were not the law, landowners, by dedicating land to the public use, could subject the authorities to intolerable burdens and compel the construction and maintenance of expensive roads, etc., which the public convenience does not require. *Baltimore v. Broumel,* 86 Md. 153, 158.

Such acceptance may be either express and appear of record, or be implied. It may be express, for example, as where the Mayor and City Council of Baltimore, by ordinance duly passed,

accepts a dedicated street. An example of a blanket acceptance of certain streets, avenues, lanes and alleys in Baltimore City, unconditionally dedicated as highways, will be found in Balto. City Code 1906, Art. 35, Sec. 19.

Acceptance may be implied either from repairs to the dedicated street or road knowingly made or paid for by the authority which has the legal power to adopt the street or highway, or from long use by the public. *Ogle v. Cumberland,* 90 Md. 59, 62; *Canton Co. v. Baltimore,* 106 Md. 69, 11 L. R. A. N. S. 129.

An acceptance by an unauthorized person, whether such acceptance be express or implied, will not bind the public. Thus, the City Commissioner of Baltimore City, broad as were his powers over the streets of the city, had no authority to bind the city by an acceptance of a dedication. *Baltimore v. Broumel,* 86 Md. 153, 160.

The user or prescription by the public, which will be sufficient to make a public highway of a dedicated street or road, so as to bind the public, must be an uninterrupted user by the public for at least twenty years, and such user for any less period of time will not suffice. *Kennedy v. Cumberland,* 65 Md. 514, 522; *Ogle v. Cumberland,* 90 Md. 59, 63. It should be noted, however, that twenty years' use by the public under claim of right evidenced by the use, will give a right to the road or street of which the owner of the fee cannot divest the public, no matter what may have been his intention. Irrespective of the question of intention, uninterrupted use by the public may give the public an irrevocable right. This result follows not because an intention to dedicate is conclusively presumed, but because by the lapse of the statutory period a perfect title by prescription vests in the public. *Canton Co. v. Baltimore,* 104 Md. 582, 587.

The rights of the public and of the municipality are the same

whether the street or road has been regularly opened and condemned as a highway, or whether its use as such has been acquired by dedication or by prescription. *McMurray v. Baltimore,* 54 Md. 103, 109. That is to say, a road or street, which has been duly dedicated and accepted is as much a public highway as a road or street which has been regularly condemned. Contra, in case of condemnation by Baltimore City under Act 1908, Ch. 54, where the fee is condemned.

PROCEEDINGS TO ENFORCE PUBLIC RIGHTS.

It is very generally recognized that any citizen, specially injured in his individual rights with respect to a misuser or diversion of dedicated property, may maintain an action to enforce or preserve the same. *Bembe v. Anne Arundel Co.* 94 Md. 321; *Anne Arundel Co. v. Watts,* 112 Md. 353, 357. Thus, persons owning property fronting on, or adjaent to, a public road or park have such special property rights as to entitle them to maintain a suit to enforce or preserve the use of such road or park. *Gore v. Brubaker,* 55 Md. 87, 89, etc.

It is generally held that a municipality may maintain an injunction suit to protect the rights of the public in a dedicated park or square, and may also maintain ejectment to recover possession of the dedicated property from anyone wrongfully withholding it. In Marlyand, however, an ejectment will not lie for an incorporeal right of easement in land, such as exists in favor of the public in case of dedication. The theory of this ruling is that those entitled to a right of way or other easement have not such title as is necessary to support an ejectment. *Canton Co. v. Baltimore,* 106 Md. 69, 94, 95, 11 L. R. A. N. S. 129. *Callaway v. Forest Park Co.* 113 Md. 7; *Oberheim v. Reeside,* 116 Md. 265, 275.

As to the right of the owner of the fee subject to the easement to bring ejectment see *Weyler v. Gibson,* 110 Md. 636, 652.

Such owner cannot bring ejectment against the public exercising easement.

He can bring ejectment against any person who has wrongfully seised and occupies the land exclusively to his own use.

He can in the ejectment recover such land only subject to the easement.

CHAPTER XXX.

DISCOVERY, CONQUEST AND TREATY, CONFISCATION AND ESCHEAT, EMINENT DOMAIN.

Title by dedication just considered, while not a method of acquisition by the State as such, is yet a form of acquisition of title by the general public as contra-distinguished from private individuals. Several methods of acquisition of title by the State or public or quasi public corporations still require consideration. The State may acquire title by any of the methods already considered, except by descent. In the case of all conveyances to the City of Baltimore, the deed, before its acceptance, must be submitted to the City Solicitor and have, endorsed on it his opinion as to its sufficiency. Baltimore City Code 1906, Sec. 63.

Title by Discovery or Occupancy.

This is the title that arises from the act of taking possession of land which prior thereto was either common property or had no owner. In England and in this country, there is no such thing as common property in lands; lands not owned in severalty belong to the State, and therefore, we must restrict our definition to lands not previously owned. England claimed, by the right of discovery, the title to the soil embraced by the original thirteen colonies in this country, denying any claim thereto of the aborigines, on the ground, as we have already seen, that their nomadic life prevented them from acquiring more than a temporary right of occupation, something in the nature of revocable or defeasible licenses or tenancies at will. As re-

gards the land, embraced within the boundaries of the State of Maryland, we have already briefly traced the transmission of title. As a consequence of this history, all lands in Maryland, are now either owned by individuals, corporations, or by the State, and there are no lands therein open to occupancy. See *ante* p. 3, 4. Title acquired by the State by conquest or treaty needs no special attention from us.

TITLE BY CONFISCATION.

Title by confiscation is also known as title by forfeiture to the State. At common law, upon his attainder of high treason, a person forfeited to the crown all his freehold estates, and in case of petit treason and felony his freehold estates for life, and his chattel interests absolutely. In this country the effect of a conviction of crime is rarely to forfeit all land of the wrongdoer. The Declaration of Rights of Maryland, Art. 27, provides that "no conviction shall work corruption of blood or forfeiture of estate." The Constitution of the United States, Art. 3, Sec. 3, Clause 2, provides that "no attainder of treason shall work forfeiture except during the life of the person attainted." Code, Art. 27, Sec. 457, provides that "no conviction or attainder shall work corruption of blood or forfeiture of estate; the estate of such persons as shall destroy their own lives shall descend or vest as in the case of natural death; if any person be killed by casualty, there shall be no forfeiture in consequence thereof."

At common law, suicide, being a felony, worked forfeiture of estate to the king.

During the American Revolution, many of the Colonial Governments confiscated the lands of persons supporting the royal cause. In 1780 and 1781, acts were passed in Maryland for the confiscation of British lands and their sale by commissioners appointed by authority of the State. As to the constitutionality and effect of these Acts, see *Smith v. Maryland*, 6 Cranch 286,

305, etc. Large lots of land were sold, particularly in what is now South Baltimore, under these acts. Code, Art. 54, Secs. 19-23, still contains provisions for the patenting to persons entitled thereto of any of the British confiscated lands sold by the commissioners appointed under the authority of this State to preserve and sell British confiscated property, the title to which still remains in the State. *Hall v. Gittings,* 2 H. & J. 112, 115.

TITLE BY ESCHEAT.

At common law, an escheat of land occurred in favor of the feudal lord, in case the tenure terminated by reason of the failure of inheritable blood.

In Maryland, since the Revolution, the tenure of land has become practically allodial, the people of the State have assumed the powers of government and escheats have essentially changed their common law nature. Instead of going to the lord of the fee, who took the land in lieu of the services, because by the death of the tenant there was no one to perform the feudal services, they reverted to the State as property without an owner, upon a principle of justice that the whole community should hold the derelict property for the benefit of all. After the Revolution, therefore, lands became allodial, subject to no tenure, nor to any of the services incident thereto, and if allodial, the supreme power of the State would succeed to them, as the King would succeed to allodial property in England by the common law, upon the death of the owner without next-of-kin. *Matthews v. Ward,* 10 G. & J. 443, 450.

When the owner of the real estate dies intestate and without heirs, the State is *ultimus hæres,* and takes the property for the benefit of all. Escheat is where the lands fall back into ownership of the State, from which they were originally derived, because the owner did not dispose of them in his lifetime and died without a will and without heirs. Tenure having been

abolished in Maryland, there can, therefore, be no such thing as Title by Escheat in a private person.

In England, at comon law, where there was a trust estate, and the trustee died without heirs, the property escheated to the lord, there being then no person in being *with the legal title* to render the feudal services. But the death of the *cestui que trust* without heirs did not operate as a forfeiture to the lord, because, in accordance with the feudal idea of tenure, the trustee, being *in esse* and being in the legal seisin of the land, was the tenant possessing capacities to perform the feudal services; as against him the King possessed no equity. The trustee, could, therefore, hold the property absolutely, there being no one to enforce the trust. This whole doctrine was based, however, upon the theory of feudal tenure, and with the abolition of feudal tenure it, *ipso facto* and without the necessity of legislative interference, ceased to prevail. The law now is well-settled that the owner of the beneficial fee simple dying intestate and without heirs, the land escheats to the State. *Matthews v. Ward,* 10 G. & J. 443, 449. At common law, *aliens* had no inheritable blood. They could neither take by inheritance nor themselves have heirs. The lands of aliens and of citizens, whose heirs being aliens could not inherit, would, therefore, escheat at comon law. But an alien could take lands by purchase, though not by descent, or in other words, while he could not take by act of the law, he could take by act of the parties, but not for his own benefit, but for the benefit of the State; or, in the language of the ancient law, the alien had the *capacity* to take, but not to *hold,* lands, and they might be seized into the hands of the sovereign. *Louisville School Bd. v. King,* (Ky.) 15 L. R. A. N. S. 379, note. He could probably not maintain a real action for the recovery of the lands, but he could defend his title to the lands as against all persons except the sovereign. In other words, his title, while good for certain purposes, was for the benefit of the State and subject to be

divested by the state, upon an inquest of office found or other notorious act equivalent thereto. The practice of an inquest of office found early fell into disuse, and the issue by the land office of an escheat patent was held to have the same effect as the ancient proceeding of office found in divesting the title of an alien to freehold land in this State. *Guyer v. Smith,* 22 Md. 239, 247.

There was apparently no restriction on the right of an alien to acquire leasehold property, and in numerous cases aliens, desiring to acquire property, took the same under a lease. By the Act of 1825, Ch. 66, aliens under certain circumstances were permitted to inherit or to transmit by descent, lands situated in this state. The present law, Act 1874, Ch. 354, is to be found in Code, Art. 3, Sec. 1. By its provisions, aliens, not enemies, may take and hold lands acquired by purchase or to which they would, if citizens, be entitled by descent, and may sell, devise, dispose of or transmit the same to their heirs as fully as if, by birth, they were citizens of Maryland.

When the state acquires title to land by escheat, it is invested with all the rights, privileges, priorities and appurtenances incident to the land itself, and with which it was held by the person by reason of whose default of heirs it had become escheat. It also takes the property subject to all liens and incumbrances existing thereon at the time of the escheat. *Casey v. Inloes,* 1 Gill, 430, 507. The state thus succeeds to the title of the deceased owner, with all his rights and subject to all his liabilities arising from or connected with the ownership of the escheated land.

Statutes provide for the patenting to private individuals of land that has escheated to the state, and are to be found codified as Code, Art. 54, Sec. 25, etc., and Act 1910, Ch. 748. Such patents are known as escheat patents. The general rule of the Land Office is to grant the patent, even in cases of doubtful character, or even when a caveat is filed to its issue. This

rule was adopted, because, in the event of a decision adverse to the caveatee, he would be excluded from opportunity to have his rights examined and decided upon by any other tribunal; whilst the action of the commissioner in permitting the patent to issue would leave both parties to have a full and fair trial respecting the title to the property in contest. *Donnelly v. Hillert,* 9 Md. 570, 573. Thus, the parties interested may try the validity of the patent afterward by suit in ejectment. *Armstrong v. Bittinger,* 47 Md. 103, 108.

The escheat patent confers upon the patentee the same estate with the same rights and subject to the same liabilities as the estate acquired by the state by virtue of the escheat. *Casey v. Inloes,* 1 Gill, 430, 510. An escheat patent is *prima facie* evidence that the land is liable to escheat, but this presumption may be rebutted by showing that the former owner did not die intestate and without heirs. *Brown v. Shilling,* 9 Md. 74, 80.

TITLE BY EMINENT DOMAIN.

Eminent domain is the right of the nation, or of the state, or of those to whom the power has been lawfully delegated, to condemn private property for *public use* and to appropriate the ownership and possession of such property for such use, upon paying the owner a due compensation to be ascertained according to law. *Moale v. Baltimore,* 5 Md. 314, 320.

It is in the nature of a compulsory purchase of the property of a citizen for the purpose of applying it to the public use. Its existence is indispensable to the administration of government; otherwise, the legitimate operations of government might be embarrassed by the unreasonable and perverse refusal of individuals to part with their property imperatively needed for public use.

The result of the exercise of the power in connection with land is to transfer to the state, or to the corporate body to

which the power is delegated by the state, all or some of the rights in particular land previously vested in a particular individual or in a number of individuals. The right is inherent in all sovereign states, and written constitutions provided for its exercise are only declaratory or previously existing universal law. The constitutions of the various states contain provisions securing the right of adequate compensation to the individual whose land is taken. In some states, compensation must be made before the land is taken; in others, the right is given to take the property and adjust the matter of compensation later.

By virtue of the provision of Constitution, Art. 3, Sec. 40, Maryland belongs to the former class of states. "The general assembly shall enact no law authorizing private property to be taken for public use, without just compensation as agreed between the parties, or awarded by a jury, being first paid or tendered to the party entitled to such compensation." (Proposed amendment to State Constitution as to city condemnations, Act 1912, Ch. 402).

The Federal Constitution (5th Amendment) provides that private property shall not be taken for public use without just compensation.

The right of eminent domain lies dormant in the state until legislative action is had pointing out the occasion, mode, conditions and agencies for its exercise; the right to exercise the power must be conferred by statute, either in express words or by necessary implication. The power of eminent domain is in derogation of common right, and, therefore, statutes conferring it are to be strictly construed, and are not to be extended beyond their plain provisions. The right to exercise the power is strictly limited to the purposes specified in the statute conferring it. The, *Bellona Co.'s case,* 3 Bland, 442, 448. The provisions of the statute must be strictly followed, and every form or ceremony prescribed must have been performed, before the right of the government will have been perfected and the

right of the citizens appropriated. *R. R. Co. v. Boyd,* 63 Md. 325, 331.

There are several matters to be considered in this connection:

First.—Private property can be taken *only for a public use or purpose.* It cannot be taken for private purposes. The words "public use" do not mean merely a use of the government of the State of Maryland and its inhabitants as such, but embrace within their scope a use of the Government of the United States, such as the taking of land in Maryland for the purpose of supplying water to the City of Washington. *Reddall v. Bryan,* 14 Md. 444. The power of condemnation may be delegated by the state to municipal corporations, or to publlic or private corporations, provided that it can be exercised only for a public use. According to the weight of authority, the legislature has the power to confer the power of condemnation upon a private individual. *Tidewater Canal Co. v. Archer,* 9 G. & J. 479, 483, seems likewise to be authority for this proposition.

The words of the Constitution that private property may be taken only for public use are mandatory. *Reddall v. Bryan,* 14 Md. 444, 477. It is indispensable that the use for which private property is taken should be of a public nature. *Van Witsen v. Gutman,* 79 Md. 405, 412; *Townsend v. Epstein,* 93 Md. 537, 555. This means a use or right of use by the public, or some limited portion of the public. It does not mean merely that the use must be of public utility or advantage. The public must actually use it. *Arnsperger v. Crawford,* 101 Md. 247, 253, 256. The test whether a use is a public one or not is whether a public trust is imposed on the property; whether the public has a legal right to the use, which cannot be gainsaid or denied or withdrawn at the pleasure of the owner. "Public interest" and "Public use" are not synonymous. It is not enough that the proposed taking shall be to the interest of the public; it must be for the public use. *Arnsperger v. Crawford,*

101 Md. 247, 252, etc.; *Webster v. Pole Line Co.* 112 Md. 416, 426. It is not competent for the legislature to confer on the City of Baltimore the power to take private property for any use but a public one. *Kane v. Baltimore,* 15 Md. 240, 249. As we have already seen, though the use must be a public one, just so it is a public one, the power may be conferred upon a municipal corporation for municipal purposes and even upon a private corporation exercising a public function, such a corporation being sometimes spoken of as a "quasi" public corporation or a public service corporation. But the corporation must be one in which the public is interested, and from whose existence the public is to derive a benefit. The use must be in fact public or must have for its object the public utility, though coupled with objects of gain or emolument. *New Cent. Co. v. George's Creek Co.* 37 Md. 537, 560. The State has no more right to take one man's land and confer it upon another than that other has to take it for himself without the owner's consent. To subordinate this most sovereign power to any private end would be a perversion of the highest prerogative known to constitutional government. *State v. Graves,* 19 Md. 351, 369.

The question of the exercise of the power of eminent domain over private property is exclusively one of discretion in the legislature; but whether the use in any particular case is a public or private one is a question for the courts, for otherwise the constitutional restraint would be utterly nugatory, and the legislature could make any use public by merely declaring it so, and hence its will and discretion would become supreme, however arbitrarily and tyranically exercised. It lies within the discretion of the legislature to direct or determine that private property shall be taken for public use. It lies in its discretion to determine to what extent, on what occasions and under what circumstances this power shall be exercised. The courts have no right to review or control its decisions on

these points; but it is indispensable that the use for which private property is taken should be of a public nature, and the judiciary must decide the question as to whether the use is public or private. *Arnsperger v. Crawford,* 101 Md. 247, 252. Likewise, in the case of municipal and quasi-public corporations upon whom the power of eminent domain has been conferred, the nature of the use, whether public or private, is always open to review in the courts. *Van Witsen v. Gutman,* 79 Md. 405, 411, etc. The fact that the ordinance of the Mayor and City Council describes the contemplated taking as for the benefit of the public can have no effect when the facts are otherwise. *Townsend v. Epstein,* 93 Md. 537, 556; *Webster v. Pole Line Co.* 112 Md. 416, 426; *Grafton v. R. R. Co.* 16 N. D. 313; 22 L. R. A. N. S. 1, note.

Examples of taking for public use: for opening, widening and closing roads for streets, as in *State v. Graves,* 19 Md. 351, 369; *Bond v. Baltimore,* 116 Md. 683,689; for rights of way for railroads, as in *New Central Co. v. George's Creek Co.* 37 Md. 537, 560, 563; for canals, as in *Tidewater Canal Co. v. Archer,* 9 G. & J. 479; for supplying water for cities, *Kane v. Baltimore,* 15 Md. 240, 249; for depots, yards and terminal facilities for a railroad, *Phipps v. R. R. Co.* 66 Md. 314, 323; for a house to accommodate passengers awaiting the arrival of cars, *Hamilton v. R. R. Co.* 1 Md. 553, 567; erecting a telegraph or telephone line, *Am. Tel. Co. v. Pearce,* 71 Md. 535, 548; *Webster v. Pole Line Co.* 112 Md. 416, 427, etc.

The laying of a switch in a public street from an existing railway track to an express company's warehouse on the side of the street to be used for express purposes, is for a public use. *Dulany v. U. R. & E. Co.* 104 Md. 423, 440.

Examples of private use: The closing of an alley, thus depriving owners of adjacent property of their easement therein, so as to permit a private individual to erect a building in the bed thereof. *Van Witsen v. Gutman,* 79 Md. 405, 416. Per-

mitting the owners of lots on opposite sides of a public alley to connect the same by covered bridges so as to obstruct the light and air of adjacent lot owners. *Townsend v. Epstein,* 93 Md. 537, 550. Condemning land for use as a private road for the use of particular individuals who may lawfully exclude therefrom the public. *Arnsperger v. Crawford,* 101 Md. 247, 251. A cemetery belonging to a private corporation is land devoted to a private and not a public use. *St. James' Church v. R. R. Co.* 114 Md. 442.

Second.—Just compensation must be paid or tendered to the owner or owners of the property before it can be taken. *Susquehanna Transmission Co. v. St. Clair,* 113 Md. 667; Constitution of Maryland, Art. 3, Sec. 40, Constitution of the United States, fifth Amendment. The Constitution does not declare what shall constitute a taking. This is a question of definition left to be determined by proper construction of the terms employed. *O'Brien v. R. R. Co.* 74 Md. 363, 373. The broad distinction is to be made between an actual physical taking of the property and acts which, while not directly encroaching upon private property, yet, in their consequences, impair its use. The former constitutes a taking within the meaning of the constitutional provision, the latter does not. Thus, the damages done to the water power of a mill by means of an increased flow of water carrying debris into the race caused by the grading and paving by the city of one of its public streets was not a taking of property within the constitutional sense. *Cumberland v. Willison,* 50 Md. 138, 148. Where a party was an abutting owner of property on the east side of Howard street, in this city, with no interest in the bed of the street, and he claimed that by reason of his abutting ownership his property was "taken" by the railroad company in making an open cut on the west side of Howard street, opposite his property, it was held that this was not a taking of his property so as to entitle him to compensation prior thereto.

O'Brien v. R. R. Co. 74 Md. 363, 375. Nor is the erection in the center of a street of a stone abutment to carry the iron superstructure and to serve as an approach to an elevated railway a taking of the property of an abutting property owner. *Garrett v. R. R. Co.* 79 Md. 277, 286. In all these cases there was no such taking as to require, as a prerequisite to the right to do the particular act involved, that compensation should be paid or tendered. There must be an actual physical taking of the property or some part of it.

Property owners must be secured in the use and enjoyment of their property until the damages are ascertained and paid or tendered. All proceedings had prior to such tender and payment are absolutely void, and no subsequent tender of compensation can validate them. *Baltimore v. Hook,* 62 Md. 371, 377. This does not mean that the condemning authority may not carry out such matters as are merely preliminary to the tender of compensation, such as the making and reporting of the survey of the land to be condemned and the assessing of damages and benefits. Until these preliminaries have been determined, there can be no rational basis for ascertaining the compensation due. *Stuart v. Baltimore,* 7 Md. 500, 516; *Shanfelter v. Baltimore,* 80 Md. 483, 490. All that is meant is that the land cannot be entered upon and that no title will pass until compensation has been tendered or paid. Thus, in *R. R. Co. v. Boyd,* 63 Md. 525, the ordinance for the condemnation of certain streets provided that the Baltimore and Ohio company should pay all damages that might be awarded in excess of benefits. It appeared that the company had paid such excess to the city, but that the city had not paid the amounts to the property holders. It was held that an entry upon the land for the purpose of constructing the railroad, without payment or tender of damages to the property holders or investment for their benefit, constituted a trespass, and that an investment of

the money after the institution of the suit was immaterial. And also *Am. Tel. & Tel. Co. v. Pearce,* 71 Md. 535, 547.

When compensation, as determined by law, has been paid or tendered to the owner thereof, the title to the property condemned vests in the condemning party and not until such payment or tender has been made. There is no need for any deed. *Norris v. Baltimore,* 44 Md. 598, 604. The condemning authority is not bound to proceed to this conclusion with the condemnation, even though all preliminary steps have been taken. Prior to the payment or tender of payment, at any time the condemnation may be abandoned, and mandamus will not lie to compel the completion thereof. *Graf v. Baltimore,* 10 Md. 544, 552; *Gardiner v. Baltimore,* 96 Md. 361, 382. While, however, the party condemning cannot be compelled to proceed to the actual taking of the property, it would be obviously unjust to allow the condemnation to be held over the property indefinitely, neither paying the damages nor abandoning the condemnation. Therefore, when property owners have suffered loss by the wrongful acts of unreasonable delay of the party exercising the right of condemnation, they are entitled to redress in an action at law for damages. *Black v. Baltimore,* 50 Md. 235, 241.

Third.—*Only such interest in the property as is necessary for the public use can be taken.*

If the purposes of the condemnation requires that a fee simple title shall be taken, then, and then only, will a fee simple title pass. As a general rule, the fee simple title is not taken, but only an easement—a right of user of the land for the particular purpose for which it was taken, and no more. In the case of opening streets and highways, the fee is not required, nor is it required in the construction of railway and telegraph and telephone lines. *Poole v. R. R. Co.* 88 Md. 533, 537; *Thomas v. Ford,* 63 Md. 346, 355. Thus, in *Kane v. Balto.* 15 Md. 249, it was held that condemantion proceedings for the

acquisition of land and water rights for purposes of a water supply, only conferred upon the city the right to use the stream for the purpose authorized by the act authorizing the acquisition. The owner still had the right to use the water in the manner in which it had been customary for him to use it at his mill, so far as such use did not interfere with the use of the stream by the city authorities for supplying the city with pure water. See Acts of 1908, Ch. 54, authorizing Baltimore City to condemn fee simple title, and reasons. And also, Act 1908, Ch. 240, Sec. 366, conferring the same right on telephone companies. *Webster v. Pole Line Co.* 112 Md. 416. Query, as to whether this is an absolute fee simple or merely a base fee conditional upon the continuance of the public use? *Webster v. Pole Line Co. supra,* p. 436.

Since the condemning party acquires only such a title as is necessary for the particular public purpose in view and pays only for such title, it necessarily follows that when land already condemned is to be subjected to a new and additional servitude, not embraced in the proper purposes of the original condemnation, the landowner is entitled to just compensation for such additional burden. The construction of horse or electric railways upon a public street is not such a new servitude as would entitle the owner of the soil to additional damages. *Hiss v. R. R. Co.* 52 Md. 242, 252; *R. R. Co. v. Consolidation Coal Co.* 95 Md. 630, 635; *Jeffers v. Annapolis,* 107 Md. 268, 277. The ground of these decisions is that these users are not additional to the original servitude, the user of the land in question by the public as a highway, but is simply a new and improved method of transit which afforded the public greater facilities in the use for which a public highway was intended. And this is true, though the electric line is an interurban, and not merely an urban one. *Jeffers v. Annapolis,* 107 Md. 268, 277; *Cf. Gosa v. Light Co.* (Wis.) 15 L. R. A. N. S. 531 and note. In a city, laying gas and water mains, electric conduits, sewers,

etc., does not constitute additional servitudes. *White v. Flannigan,* 1 Md. 525; *Cheney v. Barker,* (Mass.) 16 L. R. A. N. S. 436. In the country, on the other hand, such uses constitute additional servitudes. *Strother v. Calor Oil & Gas Co.* (Ky.), 11 L. R. A. N. S. 727. The distinction to be made is between roads that are "built up" and those which are "not built up," and not between an "incorporated town" and an "unincorporated locality," or between city and country. *Balto. Co. Water Co. v. Dubreuil,* 105 Md. 424, 428. Again, the placing of telephone poles upon a public street is an additional servitude. *Tel. Co. v. Mackenzie,* 74 Md. 36, 47; *Tel. Co. v. Ruth,* 106 Md. 644, 653. Whenever an additional servitude is to be imposed, it can only be done *in invitum,* after compensation paid or tendered to the abutting owner of the reverter. *Peddicord v. R R. Co.* 34 Md. 463, 479. The rule is the same for the owner of a leasehold interest in the reverter in the street or alley. *Shipley v. R. R. Co.* 99 Md. 115; *Tel. Co. v. Ruth, supra.* The method of condemnation is regulated by statute, or in the case of corporations may be provided for in their charters. In the case of most classes of private corporations, the procedure is provided for by Code 1888, Art. 23, Secs. 360-366. In the case of railroad companies by Sec. 251-256 of the same article. The power of the city of Baltimore to condemn property for municipal purposes is conferred and regulated by the new Charter (Act 1898, Ch. 123), Baltimore City Code 1906, Act 1908, Ch. 166, and the ordinances passed in pursuance thereof. As regards the opening, extending, widening, straightening and closing of streets, lanes and alleys, the power of the city is to be exercised by a board of three persons known as the Commissioners for Opening Streets, who act in the cases provided for by ordinances of the Mayor & City Council. Sec. 172.

In every case, the provisions of the statute and ordinances authorizing and regulating the condemnation must be followed strictly, or the proceedings will be absolutely null and void.

PART II.

LIENS.

CHAPTER XXXI.

LIENS.—VENDOR'S LIENS.

A lien at common law has been defined to be a right in one man to retain that which is in his possession, belonging to another, until certain demands of the person in possession have been satisfied. This common law lien is founded upon the fact of possession, and is generally lost when the possession is abandoned. This sort of lien exists only in the case of personal property. Liens affecting real estate, as liens, are of exclusively equitable origin. Equitable liens may exist wholly independently of possession, and under circumstances which would give the party no common law right at all. Bispham's Equity, Sec. 28. As a consequence of the reaction of equity upon law, some of these liens are now accorded recognition in courts of law. In addition to these liens, there are now certain forms of liens created by statute. The effect of each of these liens is to encumber the title to the real estate affected by them, and they, therefore, now demand our attention. The more important of them are:

VENDOR'S LIENS AND VENDEE'S LIENS.
MORTGAGES.—TECHNICAL AND EQUITABLE.
THE LIEN FOR OWELTY OF PARTITION.
MECHANIC'S LIENS.
JUDGMENT LIENS.
ATTACHMENT AND EXECUTION LIENS.
LIENS FOR TAXES AND ASSESSMENTS.
LIEN OF DECEDENT'S DEBTS.
LIEN OF COLLATERAL INHERITANCE TAX.

LIEN OF STATUTORY PREFERRED STOCK OF CORPORATIONS.

BAIL BOND.

In this connection, although not a lien, yet as it operates as a possible incumbrance on the title, we shall treat of the doctrine of *lis pendens.*

VENDOR'S LIEN.

In the case of a sale of land, where the whole, or any part of the purchase money remains unpaid, it is an established general rule, derived from the civil law, that the *vendor holds a lien* upon the estate sold for the unpaid purchase money. Equity recognizes and enforces a lien on the land as security for the unpaid purchase money, whether the legal estate has been conveyed to the vendee or not, and this lien exists independently of any special agreement, as an incident of the contract of sale of real estate. *Dance v. Dance,* 56 Md. 433, 436.

The vendor, parting with the legal title, still retains his lien as a security for the payment of the purchase money, and the vendee holds as trustee for the vendor, and this lien, in a proper case, subsists, not only against the vendee and his heirs, and other privies in estate, but against those claiming as volunteers, judgment creditors and all subsequent purchasers for value, with notice that the purchase money, or any part thereof, remains unpaid. *Carr v. Hobbs,* 11 Md. 285, 295; *Schwarz v. Stein,* 29 Md. 112, 117, etc.

There are two classes of cases in which this vendor's lien may arise.

First.—Where an absolute deed has been made by the vendor to the vendee, but part, or the whole, of the purchase money is unpaid. Act of 1910, Ch. 216, Secs. 30-37.

It would be technically more accurate to call this lien a grantor's lien after the deed has been delivered. Prior to the passage of the Act of 1910, Ch. 216, this vendor's or grantor's lien was held not to be extinguished by a recital in the deed

that the consideration had been paid. *Hooper v. Trust Co.* 81 Md. 559, 588; but by the provisions of Sec. 30 of that Act, no vendor's lien of this class can now exist "for any other or different sum or sums of money than the sum or sums that shall appear to be due on the face of the deed or instrument conveying the same, and be therein, together with the time or times set for the payment thereto, specified and recited."

The recital in the deed that the consideration has been paid, is not a bar to an action of assumpsit to recover the unpaid purchase money. *Fry v. Talbott,* 106 Md. 43, 50.

Second.—Where the vendor reserves in himself the legal title to the land, but merely executes to the vendee a bond of conveyance of the land, which is enforceable in equity.

In both of these cases, the right of the vendor to charge the property sold with the payment of the unpaid purchase money, is called a vendor's lien. The first class of vendor's liens just described, is known as a "vendor's lien proper," and the second class is known as a "vendor's lien improper." Both classes of liens are enforceable by the sale of the land covered by them, under the provisions of Code, Art. 16, Sec. 208. In addition, in the case of the vendor's lien proper, if the power of sale, provided for by the Act of 1910, Ch. 216, Sec. 31, is contained in the deed conveying the property, the lien may be enforced by the exercise of that power. This procedure is like that provided for mortgages foreclosed under a power of sale, which will be more fully treated hereafter. *Post* p. 234-236.

In Maryland, the vendor of real estate or chattels real has no right, upon default of the vendee, to sell the same and charge the difference, if any, to the vendee. While this may be done in the case of chattels personal, *Register v. Register,* 104 Md. 1, 14, it may not be done in the case of real and leasehold property. *Swarz v. C. & S. Realty Co.* 106 Md. 290, 293.

Prior to the passage of the Act of 1910, Ch. 216, in the case of the first class of vendor's lien, that is, where the legal title has passed from the vendor to the vendee, the lien could be easily and readily lost. Being purely a creature of a court of equity, it was subject to the equitable doctrines of priority and notice. Thus, if land affected by such lien passed to a *bona fide* purchaser without notice, the lien was lost. *Christopher v. Christopher,* 64 Md. 583; *Homestead Asso. v. Moore,* 80 Md. 102. Again, such a lien was held to be lost by implied waiver by the act of the vendor in taking from the vendee a bond or note for the unpaid purchase money, with some third person as security thereon, or a mortgage on the property sold or a part of it, or upon other lands, or from the acceptance of a pledge of chattels. *Carrico v. Bank,* 33 Md. 235, 242, 243.

By the provisions of the Acts of 1910, Ch, 216, the acceptance by the vendor or any guarantee, or endorsement, or collateral or other security to insure the full payment of any lien expressly retained as above set forth, is not in any case to be construed as a waver of such lien; but the vendee is to be credited with the proceeds from the sale of any such collateral or other securities. (Sec. 36.) And inasmuch as the lien can only arise where expressly reserved, upon the face of the deed conveying the property, there can be no question of the conveyance of the property to a *bona fide* purchaser without notice of the existence of the lien.

The law with respect to the conveyance of lands, subject either to a vendor's lien properly so called or to a vendor's lien improperly so called, is thus made the same. In the case of the vendor's lien improperly so called, the existence of the lien can always be inferred from the fact that the vendor has retained the legal title in himself. *Schwarz v. Stein,* 29 Md. 112, 118.

ASSIGNMENT OF VENDOR'S LIEN.

Unlike the lien of a mortgage, the vendor's lien is not assignable by a mere assignment of the claim for the unpaid purchase money, although, of course, it may be expressly assigned. *Hooper v. Logan,* 23 Md. 201, 209. The vendor's lien properly so called may be assigned short at the foot of the deed reserving it, just as in the case of mortgages. Act of 1910, Ch. 216, Sec. 35.

If the assignment of the purchase money debt is so made by the vendor, that there can be no recourse to him if the debt is not paid, in consequence whereof the vendor is released from all liability to the assignee, and the latter can look only to the vendee for payment, the lien is held to be extinguished. The reason for this rule is, that the lien is raised in equity only for the benefit and security of the vendor, and when the latter is paid in full by the assignee, and has no further liability to the assignee, the lien has fulfilled the purpose which called it into being, and is regarded as extinguished. *Walsh v. Boyle,* 30 Md. 262, 269. If, however, in the event that the vendee fails to pay the purchase money debt, the vendor's assignee is nevertheless entitled to hold the vendor liable as endorser, guarantor, etc., the lien is still necessary for the protection and security of the vendor, and is held not to be extinguished by the assignment of the debt. It is submitted that the Act of 1910 has most likely not made any change in this rule.

RELEASE OF VENDOR'S LIEN.

The vendor's lien, properly so called, may likewise be released by a short release recorded at the foot of the deed, reserving the same. Act of 1910, Ch. 216, Sec. 35. The following form is sufficient: "I hereby release the vendor's lien retained in the above deed. Witness my hand and seal, this.....day of.....

.....(Seal.)"

Act of 1906, Ch. 65.

If such a lien shall be duly released of record after the date of maturity of the notes, other instruments or debts therein mentioned, such notes, other instruments or debts shall be conclusively presumed to have been paid so far as any lien upon the property or estate mentioned in the said deed or instrument is concerned. Act of 1910, Ch. 216, Sec. 34.

By Sec. 33 of this Act, power is given to the parties to make the notes given for the purchase money, and secured by the lien, payable in the order of their maturity out of the proceeds of the sales of the property subject to the lien. In the event of such sales, the notes or instruments of indebtedness already then paid, are to be regarded as though they had never been given.

SUBROGATION.

A party, who, having become surety for the payment of the purchase money, actually pays it, will be subrogated to the vendor's lien. As a consequence of this equitable doctrine, a sort of equitable assignment of the lien is held to have taken place in favor of such surety. He will then be entitled to precedence against the land, or its proceeds, as against all judgment creditors of the purchaser and against mortgage creditors of the purchaser who became such, with notice that the purchase money was unpaid. *Carrico v. Bank,* 33 Md. 235, 241. Three things must concur in order that such subrogation may take place: 1. The party claiming to be subrogated must, as surety, have become liable for the payment of the purchase money; 2. He must have paid the purchase money to the vendor; and 3, The vendor's lien must not have been either waived, abandoned or extinguished. *Walsh v. McBride,* 72 Md. 45, 55.

VENDEE'S LIEN.

If the purchaser of an estate prematurely pays the purchase money before the estate is conveyed to him, the money will be considered as a lien on the estate, in the hands of the vendor, for the vendee, or, in the case of his death, for his personal representatives. *Carr v. Hobbs,* 11 Md. 285, 295; *Davis v. Realty Co.* (N. Y.) 20 L. R. A. N. S. 175 and note.

CHAPTER XXXII.

MORTGAGES.

The practice of the voluntary giving of his land by the debtor as security for his debt is very ancient. Pledges of land are often mentioned in Domesday. In the time of Glanville (Chief Justiciar in the last years of Henry III), pledges of land were of two kinds—*vivum vadium* and *mortuum vadium*. Where a *vivum vadium* was created, the land was conveyed to the creditor to be held by him for a certain period, during which time the rent and profits went toward the discharge of the debt. In a *mortuum vadium* there was no such arrangement as to the profits. The latter class of security was looked on as a species of usury, and, though not absolutely prohibited, rendered the creditor liable to the penalties of usury. It appears, however, that upon payment of the debt, the debtor might recover the land just as in the case of the pledge of a personal chattel. In the time of Littleton (Edward IV), a mortgage had become a species of estate upon condition subsequent. The land was conveyed, usually by feoffment by the debtor to the creditor, subject to the condition that on repayment of the loan by a certain day the feoffor (the debtor) might re-enter. On the failure of the feoffor to perform the condition, the law refused to regard the fact that the real nature and intent of the transaction was that the land should be held by the feoffee merely as a security for a debt, and insisted upon the enforcing of the rules relating to estates upon condition in all their strictness, holding that the estate was thereupon vested absolutely in the feoffee. At the common law, the mortgagor was regarded as having no legal title

and could not maintain ejectment unless he proved that the mortgage was satisfied prior to the bringing of the action. *Berry v. Derwart,* 55 Md. 66, 73. Mortgages almost invariably contain a provision that until default the mortgagor shall possess the mortgaged property. This provision amounts to a redemise of the mortgaged premises by the mortgagee to the mortgagor for the period for which the mortgage is to run, and this would confer many rights upon the mortgagor prior to default. Thus, where the mortgagor was in possession under such a redemise, prior to default, even at law, he was considered the owner of the land to such an extent as to be able to maintain ejectment for the land as against third parties, and in ejectment, the plaintiff must show his legal title in order to recover. *Richardson v. R. R. Co.* 89 Md. 126, 129.

By the Act of 1900, Ch. 559, Code, Art. 75, Sec. 72, it is provided that "an outstanding mortgage shall not prevent the real owner as a mortgagor of said property from maintaining an action of ejectment against any person or persons other than the mortgagee, or his, her or their assigns."

In equity, where the court looks to the substance of the transaction, and not to the mere form, the practice of the common law courts of treating the estate of the mortgagor as gone, upon his failure to pay the mortgage debt at maturity was regarded with disfavor. As the estate conveyed was very frequently, if not always, greater in value than the debt which the conveyance was intended to secure, the strict common law construction of conditions broken, and the enforcement of forfeitures thereupon, necessarily occasioned much hardship. If the mortgagor was not prepared on the day to pay the amount due, the estate became absolute in the mortgagee, and no subsequent tender or payment could operate to revest the title in the mortgagor or entitle him to any relief at law.

Equity, however, considered that the mortgage was, in fact, only a pledge for a debt, and that the payment of the debt and

interest ought to entitle the debtor to have his property back again. *Timms v. Shannon,* 19 Md. 296, 305. That is to say, equity recognized the mortgagor's *right to redeem.* Hence arose that privilege on the part of the mortgagor, which has been so long inseparably connected with mortgages—*the mortgagor's equity of redemption.* It was a right not recognized at common law, but only in chancery, and hence was called an "equity"; it was a right to buy back the land pledged, and hence was termed "redemption." This right of the mortgagor was recognized as early as the reign of Queen Elizabeth.

At first the equity of redemption was regarded as a mere right as distinguished from an estate; but it soon came to be regarded as an estate that could be devised, granted, entailed, etc. *Bldg. & Loan Asso. v. Middleton,* 112 Md. 10, 15. The view generally held in equity is that the mortgage is a mere security for the debt, and that the title for most purposes, remains in the mortgagor. *Evans v. Merriken,* 8 G. & J. 39; *Ins. Co. v. Conowingo Bridge Co.* 113 Md. 430, 445.

The equity of redemption would have rested upon a very precarious foundation, if it coud have been waived, surrendered or bargained away by the mortgagor at the time of making the mortgage, because the same necessity which drove the mortgagor to the position of borrower would also inevitably have led him to submit to any terms of stipulation, however harsh, which the lender of the money chose to insist upon. The right to redeem would, therefore, in many cases have been surrendered in favor of the mortgagee at the time of the loan, and thus have been rendered of little practical value, if equity had not again interfered for the protection of the debtor. It was, consequently, at an early date determined, and it is a settled and fundamental doctrine in the law of mortgages, that the mortgagor cannot, by any stipulation or agreement made in the mortgage instrument, or at the date of its execution, waive or surrender his right to redeem.

So deeply rooted is this doctrine that it has crystalized into the form of a maxim: "Once a mortgage, always a mortgage, and nothing but a mortgage." The meaning of that is that the mortgagee shall not make any stipulation which will prevent a mortgagor who has paid principal, interest and costs from getting back his mortgaged property in the condition in which he parted with it. Lord Davey in *Noakes & Co. Ltd. v. Rich,* A. C. (1902) 24.

But while a man may sell his equity of redemption the day after the mortgage is created, if he chooses to do so, a court of equity will view with distrust and scrutinize with closeness the negotiations leading to the making of the conveyance whereby it is claimed that the right of redemption has been extinguished and the previous mortgage converted into an absolute sale. To sustain a transaction as a sale, without the right of redemption, equity requires that all the circumstances attending it should be perfectly fair and free from the least taint of advantage or imposition taken or practiced by the mortgagee. *Baugher v. Merryman,* 32 Md. 185, 191. In this case, it appeared that a certain lady had made a mortgage to secure a certain mortgage debt. Subsequently, the mortgagee urged her to convey the property to him absolutely, threatening foreclosure of the mortgage and sale of the property if she failed to do so. She was distressed and perplexed with such an alternative persistently pressed upon her. She finally yielded and executed to the mortgagee an absolute deed of the property without any further consideration. It was held that this was an improper use of the mortgagee's power over the estate to influence the mortgagor to part with the right of redemption, and such as a court of equity will not sanction. *Day v. Davis,* 101 Md. 259, 269; *Cf. Felgner v. Slingluff,* 109 Md. 474, 481 & following.

Moreover, equity does not allow the privileges of a mortgagor to be clogged by any stipulations which are inconsistent

with his character as mortgagor. Thus, agreements that if interest is not paid at the end of the year, it is to be converted into principal; that a commission or a bonus must be paid in case the mortgage should be paid off; that the mortgagee shall be receiver of the rents, with a commission; or requiring redemption to be made at a particular time or by a particular description of persons, on this ground have been held to be invalid. *Dungan v. Ins. Co.* 46 Md. 469, 490; see Article by Bruce Wyman in 21 Harvard Law Review, 459 on "The Clog on the Equity of Redemption."

This equity of redemption, in the absence of some affirmative action on the part of the mortgagee, under appropriate circumstances, looking to a foreclosure of the mortgage, entitled the mortgagor to redeem the mortgage at any time within twenty years, except in case of the disability of the mortgagor, when an additional ten years was allowed.

FORECLOSURE.

It would, however, be most unjust to the mortgagee to give the mortgagor an indefinite time in which to pay the mortgage debt; and, therefore, courts of equity permitted the mortgagee, on proper proceedings instituted in equity (bill to foreclose), to cut off the right of redemption, if that right was not exercised in a time fixed by the court. This was called a *foreclosure* of the mortgage, or of the equity of redemption. *State v. Brown,* 73 Md. 484, 512.

At first, in foreclosure proceedings, equity decreed that, unless the mortgage debt were paid by the day named in the decree, the equity of redemption would be forever closed, and the mortgaged property would become the absolute property of the mortgagee. This was what was known as *strict foreclosure*. It obviously worked great hardship to the mortgagor, because the mortgaged property might be worth a great deal more than the mortgage debt, and the amount necessary to pay

it off. While there may still be a strict foreclosure in a proper case, such a practice has undoubtedly for the most part been abandoned. *Hogan v. McMahon,* 115 Md. 195, 204 citing *Ins. Co. v. Brown,* 77 Md. 64.

All that was needed to do complete justice between the parties was that the mortgagee should be empowered to sell, or to have sold, enough of the mortgaged property to pay the costs and the mortgage debt, while the balance of the mortgaged property, together with any surplus of the proceeds of the property sold, should revert to the mortgagor. Moreover, this remedy of strict foreclosure was tedious in character, and consequently rendered the taking of mortgages unattractive to the investor. The Act of 1785, Ch. 72, now codified as Art. 16, Sec. 202, was passed to remedy these defects, and empowered the court to decree, in suits instituted to foreclose mortgages, the sale of the mortgaged property, or so much thereof as might be necessary, for the satisfaction of the mortgage debt and costs, unless the mortgage debt and costs should be paid by a day fixed by the decree. *Boteler v. Brooks,* 7 G. & J. 143, 151.

In case the proceeds of the sale did not satisfy the mortgage a decree *in personam* against the mortgagee could be taken for the amount of the deficit. This remedy proved inadequate. In order to foreclose, a formal bill had to be filed and all persons interested in the equity of redemption had to be made parties defendant and given an opportunity to show cause why the foreclosure should not be decreed.

It soon became the practice to insert in mortgages a provision conferring upon the mortgagee, or any person named therein, power to make sale of the mortgaged premises, upon default, without previous authority from any court, and this practice has been authorized and regulated in this State by statute. The statutes regulating this matter are Code, Art.

66, Secs. 6-20. (Analogous provision, Act 1910, Ch. 216, for foreclosure of vendor's lien property so called, *ante* p. 224.)

Before proceding to make such sale, the person so authorized is required to give approved bond and to give twenty days' notice of the sale by public advertisement. After the sale has been made, it must be reported to the court having equity jurisdiction in the county where the sale was made, and such sale, when confirmed by said court and after the purchase money has been paid, shall pass all the title to the mortgaged property belonging to the mortgagor at the time of the execution of the mortgage, and not merely his title at the time of the foreclosure. *Felgner v. Slingluff,* 109 Md. 474, 480. Otherwise the mortgagor by a conveyance of his equity of redemption could deprive the mortgagee of his security. After the sale has been ratified, a deed is made to the purchaser. This power of sale which is created by these mortgages is what is known as a power coupled with an interest. *Ensor v. Lewis,* 54 Md. 391, 398. It passes to the assignee of the mortgage and is not affected by the death of the mortgagor. *Berry v. Skinner,* 30 Md. 569, 573. It is not annulled by a subsequent conveyance by the mortgagor of all his property for the benefit of his creditors. *Powell v. Hopkins,* 38 Md. 1, 12.

By the Act of 1892, Ch. 111, Art. 66, Sec. 24, provision is made for a personal summons to the mortgagor, in cases where the proceeds of sale made under a power of sale contained in the mortgage are insufficient, and the rendering against the mortgagor of a decree *in personam* for the amount of the deficit.

A power of sale of this kind can only be exercised by the person (or his assignee) upon whom it is conferred by, or by the attorney named in the mortgage. It cannot be exercised by an attorney not named in the mortgage. *Stump v. Warfield,* 104 Md. 530, 547. Nor by the executor or administrator of the assignee unless designated especially. *Taylor v. Carroll,*

89 Md. 32, 35. Such a power of sale cannot be exercised by a corporation mortgagee upon which it has been conferred, unless such corporation is empowered by its charter to exercise such a power. *Bldg. Asso. v. Lowdermilk,* 50 Md. 175, 179.

The reason for this is that it is contemplated that such a power should be exercised only by a natural person, as a corporation can act only by attorney or agent, and powers ordinarily cannot be delegated. *Bldg. Asso. v. Price,* 53 Md. 397, 399; *Taylor v. Carroll,* 89 Md. 32, 35. Such a power of sale, even though by assignment of the mortgage it may have devolved upon a corporation which could not exercise such a power, can again be exercised by an assignee of the mortgage from such a corporation who is a natural person. *Maslin v. Marshall,* 94 Md. 480, 486.

In this case, the power was conferred by the mortgage upon natural persons who could have exercised it. It was by them assigned with the mortgage to a corporation which could not exercise the power, and by the corporation again assigned to natural persons. The power "formed part of the security of the mortgage itself and passed with the estate to the successive assignees thereof. It must upon principle be held to have been exercisable by all such assignees execept in so far as they may have by reason of their own disability have been incapable of executing it."

In Baltimore City there is still a more effective procedure for the foreclosure of mortgages provided for by Baltimore City Code 1906, Secs. 720-732. What is known as a *consent to a decree for the sale* of mortgaged premises is usually inserted in all city mortgages, and gives the mortgagee the right to obtain, in an *ex parte* proceeding, without notification to, or summons of, the mortgagor, a decree for the sale of the mortgaged property. This decree names some party trustee to make the sale, provides for his bond and specifies the terms

of sale. The decree may be obtained at any time after the execution of the mortgage and the filing thereof in one of he equity courts of Baltimore City, either before or after default, but no sale can be made until after default. *Schaefer v. Loan & Land Co.* 47 Md. 126, 127, etc. Until the sale is reported to the court the proceeding is purely *ex parte;* thereupon any person in interest may except to the ratification of the sale. *Hughes v. Riggs,* 84 Md. 502, 505.

By the Act of 1898, Ch. 327, Baltimore City Code 1906, Sec. 731A, provision is made in cases where the proceeds of the sale are insufficient to pay the mortgage debt, for the issuing of a subpœna against the mortgagor and the obtention of a decree *in personam* against him for the amount of the deficit.

CHAPTER XXXIII.

MORTGAGES.—RIGHTS OF PARTIES.

As a consequence of the influence of equity upon law, the mortgagor, while in possession and before default, is now at law regarded as the substantial owner of the property as against everybody, except the mortgagee. He has an absolute and insurable interest in the property, and the incumbrance does not render the interest a limited one. *Ins. Co. v. Kelly,* 32 Md. 421, 440, 441; *Ins. Co. v. Conowingo Co.* 113 Md. 430, 445. He may maintain an action for injuries to his property. *R. R. Co. v. Gantt,* 39 Md. 115, 141, and, as already shown, he may even maintain ejectment. *Richardson v. R. R. Co.* 89 Md. 126; Act of 1900, Ch. 559.

Still, however, the mortgagor is not to be regarded as the owner of the mortgaged property as against the mortgagee. If the mortgage does not confer upon the mortgagor the right of possession, even before default, the legal title and right of possession are in the mortgagee until the mortgage is paid. *Bldg. Asso. v. Robinson,* 90 Md. 615, 618. As against the mortgagee, the mortgagor has no other or greater rights than those conferred upon him by the mortgage. Therefore, the mortgagor cannot, by his own act, and without the consent of the mortgagee, abandon an easement appurtenant to the estate and expressly included in the mortgage, so as to bind the mortgagee or prevent the easement from passing to the purchaser upon a foreclosure sale, although the security of the mortgage debt may not have been impaired by such abandonment. *Duval v. Becker,* 81 Md. 537, 546, etc. Nor, prior to the Act of 1900, Ch. 457, could the mortgagor assign growing

crops, which, until severed, were part of the security of the mortgage. *Wooton v. White,* 90 Md. 64, 68.

As to everybody else except the mortgagor, even at law, the mortgagee is not considered the substantial owner; he has but a dry legal title, which cannot be affected by the lien of a judgment against him. *Sumwalt v. Tucker,* 34 Md. 89, 91.

In equity, a mortgage is regarded as a mere security for the payment of the mortgage debt—a chattel interest, or a chose in action—the debt being considered the principal thing, and the mortgage only as in incident thereto. *Timms v. Shannon,* 19 Md. 296, 314. As long as the mortgagor remains in possession of the mortgaged premises, even after default, he is entitled to the rents and profits thereof; he may lease, sell and in every respect deal with the mortgaged premises as owner thereof. The rents and profits are not regarded as pledged, so long as the mortgagor is entitled to possession. *Chelton v. Green,* 65 Md. 272, 277. The mortgagor contracts to pay interest and not rent. *Homer v. Ref. & Heat. Co.* 117 Md. 411, 424.

The mortgagee is not entitled to the rents and profits of the mortgaged premises until he does at least one of three things: (1) until he takes actual possession, or (2) until possession is taken in his behalf by a receiver, or (3) until in proper form he demands, and is refused, possession.

In order to put an end to the authority of the mortgagor to collect the rents, it is only necessary for the mortgagee to manifest his intention to collect them. For this purpose, slight acts will be deemed sufficient. And so, where mortgaged leasehold property was in the possession of a trustee for the benefit of creditors, and the mortgagee demanded possession of the premises and it was refused by the trustee, whereupon she demanded payment of the rents by the tenants to her, and her notice and demand were ignored, it was held that these acts created for her as valid a lien upon the rents of the mort-

gaged premises collected by the trustee after the demand for possession of the premises made by her upon him, as she had, by virtue of her mortgage, upon the premises themselves. The right to this lien was an inherent part of the security taken when the mortgage was delivered, and an assignee cannot deprive a secured creditor of the benefit of his security. *Barron v. Whiteside,* 89 Md. 448, 461; *Griffith v. Dale,* 109 Md. 697, 703, etc.

In *Baker v. Hill,* 100 Md. 130, receivers were in possession of the mortgaged property, and had collected rents after the mortgage had become overdue. The mortgagee obtained permission, from the court which had appointed the receivers, to foreclose the mortgage, and the proceeds of the foreclosure sale, having proved insufficient to pay the mortgage debt, it was held that the mortgagee was entitled to demand from the receivers the rents so collected. *Baker v. Baker,* 108 Md. 269.

All purchasers under a foreclosure sale have the same rights and remedies against the tenants of the mortgagor as the mortgagor had, and the said tenants have the same rights and remedies against the purchaser as they would have had against the mortgagor. But no lease made after the mortgage was made is valid as against such purchaser. Code, Art. 66, Sec. 20.

Similarly, where leasehold property has been mortgaged, a surrender of the lease and the acceptance of a new lease by the mortgagor alone, without the consent or concurrence of the mortgagee, can have no effect against the mortgagee or those claiming under him by purchase at the foreclosure sale. When the mortgagor surrendered the lease, he was not possessed of the legal title to the leasehold. That was vested in the mortgagee, who was liable as assignee on the covenants of the lease. *Judik v. Crane,* 81 Md. 610, 617.

RIGHTS AND DUTIES OF A MORTGAGEE IN POSSESSION.

Where the mortgagee is in possession of the mortgaged premises after default, as mortgagee, he is required to account for all issues and profits thereof, so that they may be applied, after deducting all reasonable expenses and allowances, toward the discharge of the debt and accrued interest. The usual decree in such cases against the mortgagee in possession for an account "of what he has received, or might have received, without his own wilful default."

A mortgagee, when he enters into possession of the mortgaged estate, enters for the purpose of recovering both his principal and interest, and the estate being a security only for the money, he must be diligent in realizing the amount which is due, in order that he may restore the estate to the mortgagor, who, in view of a court of equity, is entitled to it. By taking possession, the mortgagee assumes the duty of treating the property as a provident owner would do. He is bound to keep it in good ordinary repair; or, as it is sometimes put, to keep it in necessary repair. And for all such proper or necessary repairs placed upon the property by the mortgagee, he is entitled to receive an allowance in the settlement of his accounts, and the amount so allowed will be added to the principal of the mortgage debt, if not liquidated by the rents and profits charged. *Booth v. Balto. Steam Packet Co.* 63 Md. 39, 43.

CHAPTER XXXIV.

MORTGAGES.—FORM OF A MORTGAGE.

All that is essential in a mortgage is the following:

"This mortgage, made this.....day of.....by me, witnesseth, that in consideration of the sum of.....dollars, now due from me, the said....., to....., I, the said....., do grant unto the said..... (here describe the property); provided, that if I, the said....., shall pay on or before the.....day of....., to the said ....., the sum of.....dolars, with the interest thereon from....., then this mortgage shall be void. Witness my hand and seal.

[Signature of mortgagor.] .....(Seal.)

Code, Art. 21, Sec. 59. A

You will, therefore, see at once that there are two essential parts of a mortgage—the grant by the mortgagor to the mortgagee, which is in identically the same form as in an absolute conveyance; and the condition that if the mortgage debt, etc., are paid, the mortgage shall be void. This condition is known as a defeasance. It ordinarily is part of the deed conveying the property, although it is sufficient if it be delivered and recorded at the same time as the deed. The law imposes upon the grantee of every deed which by any other instrument or writing shall appear to have been intended only as a security in the nature of a mortgage, the duty of recording with the deed to himself such instrument or writing operating as a

defeasance of his deed, or explanatory of its being designed to have the effect only of a mortgage or conditional deed. Code, Art. 66, Sec. 1.

The grantee who fails to comply with this provision of the law loses the benefit which the recording of the deed would have given him over subsequent *bona fide* purchasers. This does not mean, however, that the deed will be absolutely void on that account. Between the immediate parties thereto it is perfectly valid, and will be enforced in accordance with its true interpretation in connection with the instrument of defeasance. *Harrison v. Morton,* 87 Md. 671, 673.

So interpreted, it will likewise be held valid as against a subsequent grantee of the same property, with notice, either actual or constructive, of the existence of the first deed, and the rights of the subsequent grantee in the property will be postponed to those of the first grantee. If the second grantee, at the time he took the deed to himself was notified of the existence of the former deed, he must be held to have accepted the property subject to the incumbrance. *Owens v. Miller,* 29 Md. 144, 160.

A strict legal or technical mortgage of any use, estate or interest in land, in order to be valid, must be executed, acknowledged and recorded as absolute deeds of the same use, estate or interest, in accordance with the provisions of Code, Art. 21, Sec. 1, and following: Art. 21, Sec. 29. In addition, in order to be valid, except as between parties thereto, there must be endorsed upon it an oath or affirmation of the mortgagee that the consideration in said mortgage is true and *bona fide* as therein set forth.. This affidavit may be made by one of several mortgagees, or by an agent of the mortgagee, and when made by such agent, the latter must make an additional affidavit that he is agent of the mortgagee or mortgagees, or some one of them, and his affidavit to that effect will be suffi-

cient proof of such agency. *Milholland v. Tiffany,* 64 Md. 455, 459.

In the case of a corporation, this affidavit may be made by the president or other officer. Where the mortgagee has died, his executor may make this affidavit. Code, Art. 66, Secs.30, 31. It is the policy of this State to require mortgagees to make affidavit of the *bona fides* of the consideration mentioned in mortgages in order to give them priority over other creditors. Our statute requiring that to be done has proved to be a wise and salutary one, for there have been instances where the parties might not have been influenced by motives of honesty and fair-dealing, but were deterred by fear of the penalties imposed for perjury from making mortgages for feigned considerations. *Pleasanton v. Johnson,* 91 Md. 673, 675.

The requirement of the affidavit as to the *bona fides* of the consideration is a substantial one. Not only must the affidavit be made, but it must be true, and true as made. The true consideration must also be named in the mortgage, and a different consideration than that named in the mortgage, although valid, will not be sufficient to make the mortgage a valid one as against third parties. Independent of the question of actual or intentional fraud, where the consideration expressed in the mortgage is not *bona fide,* the true consideration would be void as against creditors of the mortgagor, without knowledge of the facts. *Ressmeyer v. Norwood,* 117 Md. 320, 331. The assignee of such a mortgagee stands in the same position as the mortgagee. *Ibid.*

Although a note for a given sum may be valid as an indemnity for a contingent liability, if the mortgage is given to secure such a note, the true character of the note as an indemnity must be stated in the condition, if stated as a debt in the condition and affidavit, it will be invalid as to creditors. So, if the whole sum secured is described as a debt, when a part of

it is merely an indemnity, the whole will be invalid, against creditors, whether there is any fraudulent design in the misdescription or not. *Ressmeyer v. Norwood, supra.*

As against third persons, without actual notice, the absence of this affidavit is fatal to the validity of the mortgage. *Cockey v. Milne,* 16 Md. 200, 207.

In all of the counties of the State and in Baltimore City, between March 30, 1896, and April 7, 1904, in addition to the above affidavit, in order that the mortgage might be held valid as against third parties, an additional oath or affirmation had to be indorsed on all mortgages to the effect that the mortgagee had not required the mortgagor or any person for him to pay in advance the tax levied upon the interest upon the mortgage debt, nor would he require any tax levied upon the interest to be paid by the mortgagor or any person for him during the existence of the mortgage. This provision did not apply to mutual and terminating building association mortgages. *Faust v. Bldg. Asso.* 84 Md. 186. Nor to mortgage deeds of trust to secure bond issues. *Musgrove v. R. R. Co.* 111 Md. 629.

By the provisions of the Act 1912, Ch. 115, the mortgage tax exists now only in Somerset, Montgomery, Frederick and Dorchester counties.

A mortgage must bear the seal of the mortgagor, but where the seal was attached to the instrument at the time of its execution and acknowledgment, the fact that it subsequently became detached will not invalidate the mortgage. *Van Riswick v. Goodhues,* 50 Md. 57, 61.

In the form given by the Code for a mortgage of real estate, no indication is given that the mortgagor's signature must be witnessed, although in all other forms given by the Code for conveying real estate, otherwise than by mortgage or assignment or release of mortgage, such attestation is provided for. Deeds of mortgage are required by the Code, Art. 21, Sec. 29, to be executed, acknowledged and recorded. Deeds are

required to be signed and sealed by the grantor and attested by at least one witness. Code, Art. 21, Sec. 10.

As we have already seen, (*ante* p. 106), attestation is no part of the execution of a deed, and at common law is not requisite to the validity of a deed; it can only be required, if required at all, by express statutory enactment. Therefore, the signature of the mortgagor need not be witnessed in Maryland. *Carrico v. Bank,* 33 Md. 235, 244. It was subsequently held that the absence of the attestation from a deed, whatever other consequences may result from it, cannot be held to avoid the effect of registration. *Brydon v. Campbell,* 40 Md. 331, 337.

The mortgage, having been duly executed and acknowledged, must be recorded within six months of the date of its execution in the county or city in which the land lies, and where it lies in more than one county, or in Baltimore city and one or more counties, it must be recorded in all the counties and the said city in which such land lies. Code, Art. 21, Secs. 13, 29, and when so recorded the mortgage takes effect as between the parties thereto from its date. Code, Art. 21, Secs. 14, 29. But a third party, a subsequent *bona fide* purchaser or mortgagee for a valuable consideration, without actual notice of such mortgage, who places his deed or mortgage on record before such mortgage is recorded, will have a claim superior to such mortgage. Code, Art. 21, Sec. 16; *Busey v. Reese,* 38 Md. 264, 266.

If the mortgage is not recorded within the six months' period no benefit will arise from recording it thereafter. Code, Art. 21, Secs. 19, 21, unless proceedings are taken under Code, Art. 16, Sec. 33, in which event, the mortgage will be regarded as though recorded within the time prescribed by law, but shall not destroy, or in any manner affect, the title of a purchaser, in case of a purchase made after the date of such mortgage, and without notice of such mortgage by the person

making the after-purchase; nor shall such mortgage, though recorded as aforesaid, affect the creditors of the party making such mortgage who may trust such party after the date of said mortgage. *Pfeaff v. Jones,* 50 Md. 263, 271, 272. But such a mortgage, though not recorded within the six months, or not at all, will still be good as between the parties and as against all creditors and purchasers with actual notice of its existence. *Johnson v. Canby,* 29 Md. 211, 220, etc. And the recording of a mortgage made in pursuance of a decree passed under Code, Art. 16, Sec. 33, operates as constructive notice, and creditors becoming such after such recording are affected thereby and are not preferred to such mortgage. *Pfeaff v. Jones,* 50 Md. 263, 271, 272.

A mortgage recorded within the six months' period will take priority over a judgment recovered against the mortgagor between the date of the mortgage and the time of recording. A judgment creditor is neither in fact nor in law a *bona fide* purchaser within the meaning of Code, Art. 21, Sec. 16. A judgment is a lien only on the debtor's interest and estate in the land, and, therefore, a purchaser under an execution takes only the estate belonging to the debtor in the judgment and execution. *Knell v. Bldg Asso.* 34 Md. 67, 71; *Valentine v. Seiss,* 79 Md. 187, 189. See *ante* p. 144, 145.

INSTRUMENTS NOT TECHNICAL MORTGAGES.

Certain instruments, commonly called mortgages, are not mortgages within the meaning of the provisions of the Code that we have been considering. The principal instances of this class of instruments are deeds of trust of property to secure issues of bonds, often called mortgage deeds of trust; and deeds of trust to secure particular debts of the grantor or the grantor's debts in general.

In these cases, instead of conveying the property directly to the creditors whose debts are to be secured, the deed is

made to some third person as trustee, to hold the property until default, and to sell and convey the property upon default. In *Charles v. Clagett,* 3 Md. 82, 93, 95, an equally divided court affirmed the view of the lower court that a deed conveying certain real estate in trust to be released and reconveyed to the grantor, if within one year he should pay certain debts named therein, otherwise the trustee to sell and apply the proceeds to the expenses of the trust and the payment of said debts, and the surplus, if any, to the grantor, is not a technical mortgage. The real estate is thus conveyed to the trustee; the *cestuis que trust* in no event are entitled to possession, nor have they any right of foreclosure.

In *Bank v. Lanahan,* 45 Md. 396, 407, the deed was a deed of trust for the benefit of all the creditors of the grantor made to a trustee. Upon default of payment, these creditors, as mere *cestuis que trust,* under the deed, could not take possession of the estate and apply the rents and profits to the discharge of their claims, nor would they have any right of foreclosure, such as a mortgagee would have under a technical mortgage. Their only remedy was the enforcement of the trust.

In *Harrison v. R. R. Co.* 58 Md. 490, 515, a deed of trust of property had been made to trustees to secure an issue of bonds held by numerous obligees, whose right to the benefit of the deed passed by indorsement or delivery of the bonds as negotiable instruments. The grantees were mere trustees and bound to act in accordance with the written request of a majority of the bondholders. This deed was held not to be a technical mortgage. On the other hand, where the deed was a conveyance to the creditors directly for the purpose of securing the debts due and payable to them, and provided for a release and reconveyance of the property on payment of the debts secured, it was held to be strictly and technically a mortgage within the meaning of the Code. *Stanhope v. Dodge,* 52 Md. 483, 490.

The result of the decisions is that the provisions of the Code relating to mortgages are to be construed as relating to mortgages technically such, and not to deeds of trust of the character above mentioned. In instruments not technical mortgages, no affidavit as to the *bona fides* of the consideration is necessary. *Carson v. Phelps,* 40 Md. 73, 97. Such an instrument need not be recorded within the six months allowed for mortgages. Under Code, Art. 21, Sec. 19, not being a mortgage, it may be recorded at any time, and when recorded it has 'as against the grantor, his heirs or executors, and against all purchasers with notice of said deed or conveyance, and against all creditors of such grantor and his heirs, who shall become so" after such recording, "the same validity and effect as if recorded within the six months' period." *Stanhope v. Dodge,* 52 Md. 483, 490.

And, under such a deed of trust, the sale of the property covered thereby need not be made in the county in which it lies, as is required in the case of technical mortgages. *Harrison v. R. R. Co.* 50 Md. 490, 514. Nor, in such a deed of trust, is it required that the sums of money to be secured thereby shall appear on the face thereof and be specified and recited therein, and particularly mentioned and expressed, to be secured thereby at the time of executing of the same—a requirement which, as we shall presently see, is mandatory in the case of a technical mortgage. *Bank v. Lanahan,* 45 Md. 396, 408; *Diggs v. Fidelity & Dep. Co. of Md.* 112 Md. 50, 72.

When such a mortgage deed of trust is made by a corporation which is thereafter adjudicated insolvent and dissolved, the contract becomes unenforceable, and a breach thereof is thereby occasioned which *ipso facto* matures the mortgage and entitles the trustee to foreclose. *Trust Co. v. Thomas,* 105 Md. 507, 528. Query, Does the mere fact of insolvency of a corporation, without judicial determination thereof, operate to mature the mortgage debt?

WHAT MAY BE SECURED BY A MORTGAGE.

A mortgage may be given to secure the performance of any collateral act which is not illegal. For example, an indemnity mortgage is one given to indemnify the mortgagee from any loss which he might sustain as indorser or guarantor of the mortgagor's note, as in *Chase v. McDonald,* 7 H. & J. 160. Mortgages are, however, usually given to secure the payment of money. At common law, a mortgage could be given to secure any legal debt, whether contracted at the time of giving the mortgage or before that time, or a mortgage might be given as security for a debt thereafter to be contracted (called a mortgage to secure future advances), provided such future debt were covered by the terms of the mortgage, and the lien of such mortgage would have attached from the date of the mortgage.

By statute now, Code, Art. 66, Sec. 2; mortgages to secure future loans or advances are not valid unless the amounts of the same and the times when they are to be made are specifically stated in the mortgage, and the mortgage does not operate as a lien except from the time that the loan or advance is actually made. *Brick Co. v. Amos,* 95 Md. 571, 590.

The requirements of the law are not gratified by a mortgage professing to secure a present indebtedness and to indemnify the mortgagee from a guarantee, where it was really given to secure future advances. And no mortgages, whether to secure past, present or future loans, shall be a lien or charge for any other or different principal sum of money than that appearing on the face of the mortgage and specified and recited therein, and particularly mentioned and expressed to be secured thereby at the time of executing the same

The object of this provision is to prevent liens from being created, to the prejudice of other creditors, for amounts of which the mortgage gives no notice. *Maus v. McKellip,* 38

Md. 231, 236, 237. And, therefore, whenever any additional sum is lent by the mortgagee to the mortgagor, in addition to that named in the mortgage, such sum cannot be secured by the mortgage already given. To secure a lien as security for the new loan, a new mortgage must be made.

In Baltimore and Prince George's counties, mortgages to secure future advances, specially mentioned and recited in the mortgage, may still be made. Code, Art. 66, Sec. 3. These provisions do not apply to mortgages to indemnify the mortgagee from loss from being indorser or security, nor to any mortgages given by brewers to malsters to secure the payment to the latter of debts contracted by the former for malt and other materials used in the making of malt liquors. Code, Art. 66, Sec. 2.

We have already considered the most important provisions that usually are contained in mortgages. The mortgage must be dated, for, when recorded, it relates back to the date of the mortgage. The names of the parties, mortgagor and mortgagee, must appear. There is usually, though not necessarily, what is called the premises or recitals, which ordinarily sets forth the purposes for which the mortgage is given, the amount of the mortgage debt, how represented— that is, whether by notes, bonds, etc.—the time of payment thereof and of interest thereon.

When no particular time of payment is limited in a mortgage, the mortgage is not, therefore, void for uncertainty, but the mortgage debt is to be paid in a reasonable time. *Farrell v. Bean,* 10 Md. 223, cited in *Lawson v. Mullinix,* 104 Md. 156, 169.

The premises are useful because the matters therein set forth may be referred to in the body of the deed, and need not again be specifically set forth. The nature of the granting and defeasance clauses has already been fully considered by us. See *ante* p. 242. Likewise, we have considered the

power-of-sale clause in county mortgages, *ante* p. 234, 236, and the consent-to-a-decree clause in Baltimore city mortgages, *ante* p. 236, and the clause of redemise, whereby the mortgagor becomes entitled to the possession of the mortgaged premises until default, *ante* p. 230. In addition to these provisions, the following provisions are usually found: There is ordinarily an express covenant on the part of the mortgagor to pay the mortgage debt and the interest thereon, and also all taxes and public dues and charges upon the mortgaged property.

Prior to the passage of the Act of 1896, Ch. 120, Sec. 146D, under the provisions of Code, Art. 66, Sec. 5, the mortgagor generally covenanted to pay all the taxes, assessments, public dues and charges levied on the mortgage debt created or secured by such mortgage. By the Act of 1896, Ch. 120, such covenants contained in any mortgage executed after the 30th day of March, 1896, were declared to be null and void. The repeal of this Act of 1896 by the Acts of 1904, Ch. 405; 1908, Ch. 564, and 1912, Ch. 115, as to Baltimore city and nineteen counties revived the right to have such a covenant in all mortgages of land in Baltimore city and in all counties except Somerset, Montgomery, Frederick and Dorchester.

There is also usually a provision that in the event of default by the mortgagor in the payment of any sum of money provided to be paid in the mortgage at the time limited for the payment of the same, or any default on his part in any agreement, covenant or condition of the mortgage, then the entire mortgage debt shall be deemed to be due and demandable. Such a provision is held to be perfectly valid and enforceable, even in equity, and is not to be regarded as working a forfeiture.

Even though there were no express covenant on the part of the mortgagor to pay the mortgage debt, his obligation so to do would be implied, and not only would the property mortgaged be subject to a lien for its payment, but the personal

estate of the mortgagor would be liable therefor, just as though the mortgage contained such an express covenant. "Every mortgage implies a loan, and every loan implies a debt," *Johnson v. Hines,* 61 Md. 122, 138.

There is also usually contained in the mortgage a covenant on the part of the mortgagor to keep the improvements upon the mortgaged property insured against loss by fire in a specified amount (usually the amount of the mortgage debt), or in an amount sufficient to cover the mortgagee's interest, and to have the policies of insurance so framed or indorsed as in case of loss to be payable to the mortgagee, as his interest may appear.

Practically any interest in land that can be conveyed can also be mortgaged. After-acquired property is often conveyed by mortgages made by corporations to secure issues of bonds. *Butler v. Rahm,* 46 Md. 541, 548; *Lumber Co. v. Lumber Co.* (N. C.) 21 L. R. A. N. S. 843, note. The validity of such mortgages in equity is well established, although they are contrary to the rules of the common law. Contra in case of chattel mortgages. *Bank v. Lindenstruth,* 79 Md. 136. Such a mortgage covers all the after-acquired property of the mortgagor that comes within the description of the mortgage the moment the property is acquired. *Diggs v. Fidelity & Dep. Co.* 112 Md. 50, 72. The mortgage lien upon such after-acquired property only attaches from the time of the acquisition by the mortgagor, and is subject to all pre-existing liens thereon. *Brady v. Johnson,* 75 Md. 445, 455. Such mortgages of after-acquired property are expressly authorized in the case of railroad corporations by Code, Art. 23, Sec. 189.

PURCHASE MONEY MORTGAGES.

By Code of 1888, Art. 66, Sec. 4, it was provided that whenever lands are sold and conveyed and a mortgage is given by the purchaser at the same time to secure the payment of the

purchase money, such mortgage shall be preferred to any previous judgment which may have been obtained against such purchaser.

This provision was held to apply only in those cases where the vendee made the mortgage for the unpaid purchase money directly to the vendor, and to have no application to cases where one advances money to another to purchase lands from a third party and takes a mortgage on those lands to secure the amount of the advance. *Heuisler v. Nickum,* 38 Md. 270, 279. Where a lessor leased land for 99 years, renewable forever, and at the same time made advances to the lessee to enable him to improve the land, and took a mortgage from the lessee to secure these advances, it was held that that was a purchase-money mortgage within the provisions of the Code, and as such entitled to priority over a previously recovered judgment against the lessee. *Ahern v. White,* 39 Md. 409, 417.

The Act of 1900, Ch. 393, amending Code, Art. 66, Sec. 4, extended the benefit of the priority of a purchase-money mortgage to a third person who advances to the vendee the purchase money in whole or in part, provided that the mortgage is given by the purchaser at the time of the conveyance of the property, and the advance of the purchase money to him, and recites that the sum so secured is, in whole or in part, the purchase money of the property purchased.

Where a purchase-money mortgage is given, the deed and mortgage are regarded as one transaction, and taking the whole together, the vendee only acquires the equity of redemption; and so where a trustee buys real estate for the trust estate and gives a purchase-money mortgage, the mortgage is valid, even though the trustee has no power to mortgage. *Stump v. Warfield,* 104 Md. 530, 541.

CHAPTER XXXV.

MORTGAGES.—ASSIGNMENT OF THE VARIOUS INTERESTS IN THE MORTGAGED PROPERTY.

Either of the parties, mortgagor or mortgagee, who is *sui juris* may assign his interest in the mortgaged property.

Transfer of title to the mortgagor's interest—the equity of redemption. The mortgagor who is *sui juris,* may, during his lifetime, convey his equity of redemption. If he die, having disposed thereof by will, it will pass as therein provided. If he die intestate, it will pass to his heirs or personal representatives, according as it is in real or leasehold property. This equity of redemption is liable for the debts of the mortgagor. If it descends to his heirs, the latter are entitled to call upon the executor or administrator to pay off the mortgage to the extent that the personal estate is not sufficient for that purpose. *Gibson v. McCormick,* 10 G. & J. 65.

The assignee of the equity of redemption can, of course, acquire only the title and estate of his grantor. He, therefore, takes the mortgaged property subject to the mortgage. But a person buying mortgaged property does not thereby bind himself personally to pay the debt. To make the purchaser liable, there must be words in the coveyance from which an agreement to pay the debt can be implied. A recital in the deed that the property is subject to a mortgage, without more, does not constitute an agreement by the grantee to pay the debt. *Chilton v. Brooks,* 72 Md. 554, 558; *Hopper v. Smyser,* 90 Md. 363, 384. Thus, a covenant of special warranty in a deed conveying property which was stated in the *habendum* clause to be subject to a mortgage, does not operate to bind the

grantee to pay the mortgage. Such a warranty only relates to, and operates to assure, the estate and interest conveyed; it does not enlarge the estate; it, therefore, only warrants the title, subject to the mortgage, and does not amount to an assumption of the mortgage. *Hopper v. Smyser,* 90 Md. 363, 384.

In order that the transferee of mortgaged property may be made personally liable for the payment of the mortgage debt, there must be words in the deed of conveyance from which, by fair import, an agreement by him to pay the debt can be inferred.

Still, where a grantee accepts a deed containing a covenant on his part to pay the mortgage debt, he becomes bound by the covenant, although he may not have signed or acknowledged the deed. *Stokes v. Detrick,* 75 Md. 256, 261; *Cf. Dawson v. R. R. Co.* 107 Md. 70, 86, holding that mutual covenants cannot arise out of a deed poll. 16 Case & Comment, 159.

Where a grantee of land, subject to a mortgage, thus expressly covenants to pay the mortgage debt, for the payment of which the mortgagor is bound, the relation of principal and surety, as to the mortgage debt, arises between the two parties; the grantee becoming the principal debtor and the mortgagor the surety. The mortgagee, may by his dealings with the grantee, recognize the grantee as the principal, as, for example, by accepting further interest notes from him. In such a case, the mortgagee is the creditor, the original mortgagor becomes the surety, and the grantee becomes the principal debtor; and the usual rule prevails that the surety is released, if the creditor makes any arrangement with the principal debtor, by which the contract is varied or changed without the consent of the surety. Thus, if the mortgagee, after recognizing the grantee as principal, agrees to extend the time of payment of the mortgage by agreement with the grantee, without the consent of the mortgagor, the mortgagee will thereby

release the mortgagor from further liability for the debt. But if there is no assumption of the debt by the grantee, the mortgagor is not discharged from liability by an extension of the time of payment given by the mortgagee to the grantee. *George v. Andrews,* 60 Md. 26, 33, *etc.; Chilton v. Brooks,* 72 Md. 554, 557; *Stokes v. Detrick,* 75 Md. 256, 261.

Now while it is true that where the grantee has assumed the mortgage debt, and the mortgagee has recognized such assumption the mortgagor becomes a mere surety for the payment of the mortgage debt, while the grantee becomes the principal debtor, yet mere delay on the part of the mortgagee in foreclosing the mortgage does not release the mortgagor from liability on the covenant to pay the debt; and although a larger sum would have been obtained if the premises had been sold when the default under the mortgage occurred than was subsequently obtainable, yet the mortgagor is liable to the full extent on the convenant. Such delay does not operate to discharge the mortgagor as surety. *Warner v. Williams,* 93 Md. 517, 520.

Where one purchases property subject to a mortgage which was usurious, and the nominal amount of the mortgage debt enters into and forms part of the price or consideration paid for the property, such a purchaser will not be allowed to set up usury in reduction of the amount appearing to be due on the face of the mortgage. If such a purchaser should be allowed to claim a reduction of the mortgage debt by reason of the alleged usury, he would be getting the property for a sum less than he agreed to pay. *Bldg. Asso. v. Gross,* 71 Md. 456; *Stuckey v. Loan Co.* 8 L. R. A. N. S. 814, note.

This decision must be held to have been on the ground that it appeared either on the face of the deed or by evidence *aliunde* that the grantee had agreed specially to pay the mortgage debt. *Mahony v. McCubbin,* 54 Md. 268, 273; In *Bldg. Asso. v. Andrews,* 95 Md. 698, 699, the grantee of the land, subject to

the usurious mortgage, did not agree to pay the specific mortgage debt, but agreed only to pay the encumbrances on the property, amounting to $2,200. It did not appear what portion of the $2,200 represented the usurious mortgage, and, therefore, it could not be said what amount the grantee assumed to pay in connection with it. It was held that the grantee was entitled to plead the defense of usury as against the mortgagee.

TACKING OF MORTGAGES.

One of the consequences of the fact that a mortgage is in form a conveyance of the legal title from the mortgagor to the mortgagee was that a second mortgagee could acquire only an equitable title to the mortgaged property—in other words, he was only an equitable incumbrancer.

Now, in case an equitable incumbrancer gets in the legal title, then, unless there is some countervailing equity to deprive him of this advantage, his position will be superior to that of his fellow-incumbrancers, in obedience to the equitable maxim that where equities are equal the law shall prevail. This is the origin of *tacking* which exists in the law of mortgages in England, but owing to the general prevalence of the system of land registration in this country has been rarely adopted here, and then only in modified form.

The doctrine may be best explained by an example. Suppose there are three mortgages, all of different date. The mortgagee first in point of time will hold the legal title; the other two will simply be equitable incumbrancers. Now, if the third mortgagee buys the first mortgage, so as to become the owner of the legal title, he has a right to tack the two mortgages (the first and the third) together and realize the whole amount due on both prior to the second mortgagee, whose security is thus, as it were, squeezed out between the first and third mortgage. But this can only be allowed in those cases

in which the third mortgagee had no notice of the existence of the second mortgage at the time he took his mortgage. If he became mortgagee with notice at the time of the second mortgage, he will not under these circumstances be allowed to protect himself by getting in the first mortgage to the prejudice of of the second mortgagee. But notice of the existence of the second mortgage, after he has advanced the money, cannot then deprive him of the right to buy in the legal title and protect himself thereby.

A junior incumbrancer, if he finds that he is likely to be postponed to a prior mortgage lien, of which he had no notice when he became mortgagee, may protect himself by getting in the legal title and using it, in the words of Lord Hale, "as a plank in a shipwreck." So, also, it was held, if a mortgagee lends a further sum on another mortgage, he will be allowed to tack the last mortgage to the first and cut out a second incumbrancer. The right to tack did not exist in favor of judgment creditors, who have a mere general lien on the property of their debtors. It only existed in favor of those who had advanced money on the credit of the specific land. Therefore, it was held a first mortgagee may tack a judgment to his mortgage.

Somewhat similar to the doctrine of tacking is that of the consolidation of mortgages, by which a mortgagee, when tendered the sum due on his mortgage, had a right to insist upon the mortgagor at the same time redeeming a debt secured on another estate, or, in other words, to say to him: "Pay off both debts, or you shall not redeem one."

These equitable doctrines, unlike most equitable doctrines, are unjust and have been generally rejected in this country as inconsistent with our system of registering title papers to land. They have never been actually applied in the State of Maryland, although considered in several decisions. In an extremely modified form they may exist in this State, as follows: "In

order to prevent circuity of action and upon the principle that he who seeks must do equity, if a mortgagor goes into equity to redeem, he will only be permitted to do so upon payment, not only of the mortgage debt, but of all other debts due from him to the mortgagee; but that the principle does not apply to affect rights of third parties; they cannot be prejudiced by it. Indeed, as against creditors and purchasers or assignees of the mortgagor, who may seek to redeem, the doctrine of tacking or consolidation, as it obtains in England, would seem to be plainly inconsistent with the provisions of our Code in regard to mortgages and the effect allowed to the registration thereof." *Brown v. Stewart,* 56 Md. 421, 431.

ASSIGNMENT OF THE MORTGAGE.

The interest of the mortgagee is personal property and upon his death passes to his personal representatives. Code, Art. 66, Sec. 21; *Alexander v. Fidelity & Dep. Co.* 108 Md. 541, 547.

The mortgagee may assign his interest expressly of by implication. *An express assignment* may be made by what is known as a long assignment (formal deed or contract); and this is the form which is to be preferred when there are any recitals to be made. It may also be made by what is known as a short assignment. Either of these forms of assignment may be made by the executor or assignee of the mortgagee. Code, Art. 21, Sec. 39. The form prescribed by the Code for a short assignment is as follows: "I hereby assign the within mortgage to the assignee. Witness my hand and seal this .....day of....." Code, Art. 21, Sec. 32. The form does not call for a witness or an acknowledgment. It is to be recorded in the office of the clerk where the original mortgage is recorded, at or near the foot of said mortgage. This form may be used by a corporation mortgagee or assignee in assigning the mortgage without the appointment of

an attorney to acknowledge the release. *Chilton v. Brooks,* 71 Md. 445, 450, 451. Every assignment made in the above form, indorsed upon the original mortgage, shall convey to the assignee every right which the assignor possessed under said mortgage at the time of the assignment thereof, in as full and ample a manner as any instrument of writing whatever could do. Code, Art. 21, Sec. 33. There is still another method of assignment of mortgages possible in Baltimore city. By Baltimore City Code 1906, Sec. 727, in a foreclosure under an assent to a decree any entry on the docket "by the person entitled to assign the said mortgage claim, of the use and benefit" of the decree, shall have the same effect as an assignment of the mortgage; but the entry shall only be made by the clerk upon an order in writing, acknowledged before a judge, justice of the peace, or notary public, by the person purporting to sign the order. Act 1910, Ch. 157.

ASSIGNMENT OF THE MORTGAGE BY IMPLICATION.

Such an assignment occurred wherever the mortgage debt was assigned. The indorsement or assignment of a bond or promissory note secured by a mortgage gave to a *bona fide* holder of such note the benefit of the lien of the mortgage as fully as though he had been named as the actual mortgagee; and this, too, though the public records furnished no evidence of the indorsement or transfer and delivery of the bond or note. The debt was held to be the principal thing, the mortgage, a mere incident thereof and security therefor; the incident followed the principal thing. The transfer, therefore, of the debt, or of the bond or note which represents the debt, which is the principal, carried with it the mortgage, which is the incident, and effectually clothes the *bona fide* holder of the note with the lien of the mortgage itself. *Demuth v. Bank,* 85 Md. 315, 323. *The holder of the mortgage note, and not the assignee of the mortgage, would be the true owner of the mortgage.*

R. R. Co. v. Goodwin, 77 Md. 271, 280, etc.; *McCracken v. Ins. Co.* 43 Md. 471, 477.

In the case last cited, it was held that any equities pertaining to the original note would extend to and govern a renewal note given in lieu thereof, and that the assignment of the renewal note *ipso facto* would carry with it the mortgage. There need be no mention of the mortgage at the time of the assignment of the debt; indeed, the assignee of the debt might have been ignorant of the existence of the mortgage and still have been entitled to the benefit of it. *Ins. & Trust Co. v. Rose*, 2 Md. Chan. 25, 34.

Sometimes the mortgage notes were assigned to different persons, and each of the assignees was then entitled to a corresponding portion of the security of the mortgage. If, in the event of foreclosure, the proceeds proved insufficient to pay all of the mortgage notes, a controversy arose as to the disposition thereof among the holders of the different notes. If there was satisfactory evidence of the intention in this respect of the parties interested, that intention was given effect. *Chew v. Buchanan*, 30 Md. 367, 373, etc.

In the absence of satisfactory evidence of such intention, different rules prevailed as to priorities in the distribution. In some states, the pro rata rule of distribution is applied. In other states, priority of assignment carries with it priority of payment out of the proceeds. In still other states, the priority in the order of maturity of the debts without reference to the priority of the respective assignments is the rule of distribution. In Maryland, is was well established that different parties holding respectively several notes, or being entitled to several notes, secured by one mortgage, unless there was something in the terms of the contract to indicate a different intention, stood in equal rights, and if the property conveyed by the mortgage was insufficient to pay the whole debt, they were

entitled to participate *pari passu* in the fund. *Dixon v. Clayville,* 44 Md. 573, 579; *Parrott v. Bank,* 88 Md. 515, 518.*

The mortgage is as much a security for the last installment or note as the first; and as between the several holders of the security, whether as original parties or by assignment, there is no equitable ground for preference or priority. It is usual to put an express provision to this effect in a mortgage deed of trust to secure bonds. The exception or qualification to this rule is where the assignor, by guarantee or otherwise, becomes liable to the assignee for the payment of the installment, or part of the debt assigned. In such case, the assignor, if he continues to hold the other portion of the debt, would not be allowed to participate in the fund, until the installment due the assignee is fully paid. The effect of a contrary rule would be to lead to a mere circuity of action. *Dixon v. Clayville,* 44 Md. 573, 579.

In *Dickey v. Bank,* 89 Md. 280, the facts were that Lewis, as mortgagee of a vessel, held three single bills secured by the mortgage, payable at different times, and certain policies of fire insurance, on the vessel. He borrowed a sum of money from the bank, pledging with it as collateral security the single bills and the policies, but only the first single bill, which amounted to more than the loan, was indorsed by him in blank. This was not paid when due, and soon afterward the vessel was destroyed by fire. It was held that the fact that Lewis had delivered the other two single bills to the bank, although unindorsed, was evidence of his intention to give the bank, as assignee of the one single bill, priority over the subsequent assignee of the other two single bills. That even if he had retained in his possession the two single bills, it would certainly

*As regards vendor's liens, by Act of 1910, Ch. 216, Sec. 33, any notes given for purchase money may be made payable in order of their maturity.

have led to a mere circuity of action to permit him to receive a distribution on the two and require the bank to sue him on the balance due it. His act in giving the two mentioned bills to the bank was as distinct a declaration that the one indorsed was to have priority over them as though he had entered into a written agreement to that effect.

Under both the power of sale provided for by the general law and the assent to a decree provided for by the local law for Baltimore city, any one of the assignees of a part of the mortgage debt is entitled to the benefit of foreclosure thereunder in case of default; in the former proceeding, the power of sale is divisible. Code, Art. 66, Sec. 6. In the latter proceeding, the holder of part of the mortgage debt may procure a decree without making the owners of the other interests parties. *Richards v. Owings,* 86 Md. 663.

Some of the consequences of this doctrine of the equitable assignment of the mortgage by the assignment of the debt were extremely important. The release of a mortgage, whether of record or not, did not furnish complete proof that the mortgage itself was released. It might very well happen that the mortgagee had assigned the mortgage debt before he released the mortgage, in which event the assignee of the mortgage debt would be entitled to the benefit of the mortgage, and the release of the mortgage would not affect him. *Boyd v. Parker,* 43 Md. 182, 199, etc.; *McCracken v. Ins .Co.* 43 Md. 471, 477.

The only way in which the subsequent purchaser or mortgagee of the property could ascertain that the notes had been paid was to require their production and cancellation. Frequently he would be told that they were destroyed, and he would have to rely on statements to that effect. How very unreliable and unsatisfactory such evidence might be is shown by *Demuth v. Bank,* 85 Md. 315.

A rule of law that could work such manifest injustice called loudly for remedial legislation. Accordingly, the Act of 1892,

Ch. 392, Sec. 25, Code, Art. 66, Sec. 25 was passed. By this Act, it is provided that the title of all promissory notes or other instruments *thereafter* made and debts *thereafter* contracted, secured by mortgage or deeds in the nature of a mortgage, shall *from and after the maturity* of such notes, other instruments or debts, be conclusively presumed to be vested in the person, persons or body corporate holding the record title to such mortgage or deed in the nature of a mortgage, and if such mortgage or deed in the nature of a mortgage is duly released of record, the promissory note, other instruments or debt secured by such mortgage or deed in the nature of a mortgage shall, *after the maturity* of such promissory notes, other instruments or debt be conclusively presumed to be paid, so far as any lien upon the property conveyed by said mortgage or deed in the nature of a mortgage is concerned. Code, Art. 66, Sec. 25. By Act 1910, Ch. 719, this same rule is applied, in the case of all mortgages made after June 1, 1910, both before and after the maturity of the mortgage debt, however evidenced.

The doctrine that a *bona fide* purchaser for value of a negotiable instrument for value without notice gets a title free from prior rights does not apply to purchasers of mortgage notes, at all events, where the notes are not negotiable or have lost their negotiable quality. An assignee of such a mortgage note does not stand in the position of a purchaser without notice as against the mortgagor and those claiming under him, notwithstanding the assignee may have taken an assignment of the mortgage without notice of any defense against the enforcement of the mortgage.

Where the assignment is made without the concurrence of the mortgagor, the assignee takes the mortgage upon the same terms and subject to all the equities and defenses that it was subject to in the hands of the assignor. The mortgagor cannot be prejudiced by the assignment. *Cumb. Coal and Iron*

Co. v. Parrish, 42 Md. 598, 613. Thus, in *Bank v. Copeland,* 18 Md. 305, 317, the facts were that a woman had been forced to sign a mortgage by duress; the mortgagee conveyed the mortgage to the bank, which had no knowledge of the duress; it was, nevertheless, held that the bank's claim was not in any respect superior to that of the mortgagee who had practiced the duress.

In *Avirett v. Bærnhart,* 86 Md. 545, the holder of a chattel mortgage and of a promissory note secured by it received certain payments on account of the indebtedness and promised to extend the time of payment for one year. He did not indorse the payments on the note, but did indorse thereon an extension of the time of payment for a longer period than one year without the knowledge of the maker, and subsequently assigned the note and mortgage to a party, who took the same as collateral security for an existing indebtedness. It was held that the assignee was only entitled to recover the amount actually due by the mortgagor.

On the other hand, where a mortgage was given for a mere pretended consideration, so that it was voidable by the creditors of the mortgagor, and the mortgagee assigned the mortgage to a savings bank as collateral security for a loan made to him, and the bank had no knowledge or notice that the mortgage was thus fraudulent as to the mortgagor's creditors, the bank will acquire a good title as against such creditors. There is here no question of protecting the mortgagor, so that the doctrine of the cases just cited would have no application, the mortgagor in this case having no equities against the mortgagee. *Bank v. Gordon,* 90 Md. 486. 501.

SUBSTITUTION OR SUBROGATION TO THE RIGHTS OF THE MORTGAGEE.

In addition to the equitable assignment of mortgages by an assignment of the mortgage debt in equity, under certain cir-

cumstances a person, who has paid the mortgage debt, will be held to be substituted for, or to stand in the place of, the mortgagee, or, as the technical expression is, *be subrogated* to the rights of the mortgagee. *Orrick v. Fid. & Dep. Co.* 113 Md. 239, 252.

Not every stranger who may voluntarily pay the mortgage debt is entitled thus to succeed to the rights of the mortgagee. Only those who are (1) entitled to pay the mortgage debt and (2) have paid it, are so entitled. In most cases, the doctrine is applied for the benefit of one who was under an obligation of some kind to pay the debt of another, as a surety who is obliged to pay the debt of his principal, or one who is obliged to pay a lien or incumbrance on property purchased by him.

Where a mortgagor conveys the mortgaged property subject to the lien of the mortgage debt and the amount of the mortgage debt is deducted from the purchase money, the mortgaged property remains the primary fund for the payment of the mortgage debt. If, then, the mortgagor is compelled to pay the debt, he may be subrogated to the rights of the mortgagee. If the mortgaged property is sold at a judicial sale, subject to the mortgage, the same principle applies. The purchase price is lessened by the amount of the mortgage, and the mortgagor, if required to pay the mortgage debt, will still be entitled to be subrogated. *Parsons v. Urie,* 104 Md. 238, 249.

The doctrine of subrogation may also be applied on equitable principles in behalf of one, who, at the instance and request of the debtor, pays a lien or incumbrance which he was under no legal obligation to pay, provided that he does not interfere with intervening rights and incumbrances. It will not, of course, be applied as against superior or equal equities. *Milholland v. Tiffany,* 64 Md. 455, 460. In this case the facts were that Hand, in consideration of love and affection, conveyed certain property to his wife; the property was subject to a purchase-money mortgage to Brown, trustee. Tiffany, at

the request of Hand, paid off this mortgage, the same being due, and took from Hand and wife a mortgage on the same security. Hand subsequently became insolvent, and, upon a bill filed by the insolvent's trustees, the conveyance by Hand to his wife was set aside as being in fraud of the rights of his subsisting creditors. The property was afterward sold by the order of the insolvent court and the proceeds of the sale were claimed on the one hand by the creditors of Hand and on the other by Tiffany as a *bona fide* purchaser, under his mortgage, without notice that the deed was fraudulent. It was held that he was not such *bona fide* purchaser, inasmuch as he was put upon his inquiry by the statement in the deed from Hand to his wife that it was made in consideration of natural love and affection. Moreover, the mortgage to Tiffany was fatally defective, inasmuch as his agent, who made for him the affidavit as to the *bona fides* of the consideration as required by law, had failed to make the further affidavit that he was the mortgagee's agent. Tiffany's mortgage was, therefore, void as against Hand's creditors. It was held that Tiffany, in paying off the purchase money mortgage upon the property, was not a mere volunteer; he had advaned the money at the request of Hand and his wife. This mortgage was a prior lien on the property. All that the creditors had a right to ask was that the property should be subject to their claims to the same extent as it was prior to the execution of the deed. Upon the plainest principles of justice, Tiffany was entitled to be subrogated to the rights of the purchase-money mortgagee.

Similarly, where a sister, at the request of her brother, paid off a large sum of money on acount of a mortgage on his property, and it was agreed that the sum so advanced was to be a charge upon the property embraced in the mortgage, but the brother was prevented by illness from carrying this agreement into effect and she died before it could be consummated; it was held that she was entitled to be subrogated to the rights

of the mortgagee to the extent of the amount so paid by her. It was true she was under no legal obligation to make the payment, but she was not to be regarded as a mere volunteer or stranger intermeddling with a matter which in no way concerned her. *Robertson v. Mowell,* 66 Md. 530, 538.

In *Reimler v. Pfingster,* 78 Md. xiv, 28 Atl. Rep. 24, a wife had advanced money to her husband, who was financially embarassed, to pay off a mortgage on his property, upon the promise to repay the sum to her. He paid off the mortgage, but did not repay the money. It was held that she was entitled to be subrogated to the rights of the mortgagee, whose debt was paid with her money, and to be entitled to priority over her husband's creditors.

A mortgagor who has sold his equity of redemption subject to the mortgage, and has had to pay the mortgage debt, is not a mere volunteer. Likewise, if one tenant in common pay the mortgage debt upon the common property, he is entitled to keep the mortgage alive until reimbursed for his share by the other tenants in common. *Parsons v. Urie,* 104 Md. 238, 251; 8 L. R. A. N. S. 559, note. Query: Where a trustee gives a purchase-money mortgage which is valid, and a second mortgage which is invalid, except as to a life estate in the property, although the second mortgagee believed that he was getting a mortgage on the fee simple interest, if the second mortgagee pays off the purchase-money mortgage, is he entitled to be subrogated thereto? *Stump v. Warfield,* 104 Md. 530, 552.

This doctrine of subrogation will only be applied where there are no intervening rights and incumbrances. *Neidig v. Whiteford,* 29 Md. 178, 182. It will never be applied against superior or equal equities. The fact that prior incumbrances upon property which has been sold have been paid out of the purchase money and the incumbrances released, when such payment was made by one whose duty it was to pay them, does not entitle the person advancing the money for that pur-

pose to be subrogated to the rights of such prior incumbrancers as against junior incumbrancers of said property. The general rule is that the payment of an incumbrance by one whose duty it is to pay it, extinguishes it. *Parsons v. Urie,* 104 Md. 238, 248. The prior incumbrances were thus fully released. If the purchaser who paid off the incumbrances desired to get the benefit of them he should have taken an assignment of them, and not have suffered them to be released and extinguished. *Boyd v. Parker,* 43 Md. 182, 201.

In this case, there were three mortgages on the property; the purchaser paid off the first two out of the purchase money and they were properly released. He also paid off the third one to the holder of the record title thereto and took a release from him, but the mortgage notes were outstanding in the hands of a *bona fide* purchaser; so that this mortgage remained unreleased. It was held that he was not entitled to the subrogated to the rights of the first and second mortgages.

Similarly, where there were two liens of different dates upon the property of A, and he created a third lien thereon, using the money derived therefrom in paying off the first lien, which was released and not assigned, the second lien would then become entitled to priority, and the holder of the third lien would not be subrogated to the rights of the first. *Green v. Bank,* 86 Md. 279, 292.

CHAPTER XXXVI.

MORTGAGES.—EQUITABLE MORTGAGES.

An equitable mortgage results from different forms of transactions, in which there is present an intent of the parties to make a mortgage, to which intent, for some reason, legal expression is not given in the form of an effective mortgage; but in all such cases the *intent to create a mortgage* is the essential feature of the transaction. *Bank v. Bank,* 91 Md. 613, 620.

There are four forms of equitable mortgages, as follows:

An equitable mortgage has been held to result:—

FROM A DEFECTIVELY EXECUTED LEGAL MORTGAGE.

FROM AN AGREEMENT TO EXECUTE A MORTGAGE.

FROM A DEED ABSOLUTE IN FORM SHOWN TO HAVE BEEN IN FACT, INTENDED TO OPERATE AS A MORTGAGE.

BY DEPOSIT OF TITLE DEEDS.

FROM A DEFECTIVELY EXECUTED LEGAL MORTGAGE.

If a party makes a mortgage, or affects to make one, but it proves to be defective by reason of some informality or omission, such as a failure to record in due time, defective acknowledgment, or the like, though even by the omission of the mortgagee himself, as the instrument is at least evidence of an agreement to convey, the conscience of the mortgagor is bound, and it will be enforced by a court of equity not only as against the mortgagor, but as against judgment creditors of the mortgagor obtaining their judgments subsequently to the date of the mortgage. *Dyson v. Simmons,* 48 Md. 207, 214; *Bank v. Gordon,* 90 Md. 486, 505.

FROM AN AGREEMENT TO EXECUTE A MORTGAGE.

In *Textor v. Orr,* 86 Md. 392, the facts were that a debtor had agreed in writing to give certain hoops to his creditors as security for the payment of certain promissory notes, and had stipulated that the hoops should be the property of the creditor in case the notes were not paid at maturity. The hoops remained in the control of the debtor, and the agreement was not recorded as required by statute to pass title when possession of a chattel is retained by the vendor. The purpose of the parties was, therefore, to mortgage the property, and the way they adopted to effectuate their purpose, while invalid and insufficient, was a binding contract between them. It was held that an equitable mortgage was thereby created.

As against creditors, the contract must be proved with clearness and accuracy and enforced within a reasonable time. *Applegarth v. Wayne,* 86 Md. 468, 472.

But where a married woman executed a promissory note, together with her husband, prior to the Act of 1896, Ch. 457, and added to her signature the words "for the payment of which I bind my separate estate," it was held that no equitable mortgage was thereby created. *Bank v. Bank,* 91 Md. 613, 621.

FROM A DEED ABSOLUTE IN FORM, BUT SHOWN TO HAVE BEEN IN FACT INTENDED TO OPERATE AS A MORTGAGE.

Parol evidence will be admissible in equity to establish the intention of the parties in this respect. *Brown v. Miller,* 101 Md. 600. Such a deed will be held to be a mortgage as between the original parties, and as against all those deriving title from the grantee who are not *bona fide* purchasers for value without notice. *Rosenstock v. Keyser,* 104 Md. 380, 385; *Funk v. Harshman,* 110 Md. 127.

BY DEPOSIT OF TITLE DEEDS.

The English doctrine that a deposit of title deeds implies an agreement to give a mortgage upon which courts of equity may base a lien is generally rejected in this country as being violative of the Statute of Frauds and incompatible with the system of registry of titles. Even in those jurisdictions in which this doctrine has not been actually rejected, it has seldom been given actual application. In some cases, however, it has been held that the placing in another's hands of a deed to real estate, together with a written memorandum stating that the property is pledged to secure the one in whose hands the deed is placed, will create an equitable lien on the property, enforceable as against the pledgor and those who merely succeed to his rights, such as his assignee for the benefit of creditors. See for example, *Port v. Carpenter,* 19 L. R. A. N. S. 206 and cases cited in note.

The third and fourth classes of equitable mortgages just referred to need give us no particular concern. We are now more particularly interested in the first and second classes.

These classes embrace, in the first place, instruments intended to operate as mortgages, but which are not valid mortgages because of some defect in their execution; and, in the second place, cases where a valid agreement to mortgage has been made, of course, incapable of specific enforcement at law. In both of these cases, equity comes to the rescue with the doctrine of equitable mortgages, creates the relation of mortgagor and mortgagee as between the parties and gives to the equitable mortgagee certain rights, even as against third persons. Such an equitable mortgage is enforceable not only as against the mortgagor himself, but against parties who claim under him as volunteers or without an equity superior to that of the creditor holding the lien. An assignee for the benefit of the creditors is such a party. He is not a *bona fide* pur-

chaser for value. He stands in the shoes of the assignor and can assert no claim to the property which the assignor could not assert. *Textor v. Orr,* 86 Md. 392, 398.

What are the rights of an equitable mortgagee against third persons? In the first place, an equitable mortgage is not enforceable against subsequent *bona fide* creditors of the mortgagor. They have no actual knowledge of the transaction; owing to the defects in the instrument executed, they have no constructive notice. They are entitled to rely on the record title which is apparently in the mortgagor unencumbered. They are, therefore, not bound by the equitable mortgage. *Cissel v. Henderson,* 88 Md. 574, 576.

As against those who were already creditors of the mortgagor at the time of the execution of the defective mortgage or of the agreement to mortgage, it should be enforced as a valid mortgage. Such creditors are no more prejudiced by an invalid or incomplete mortgage being held valid and complete than they would be had such mortgage been validly or completely executed in the first instance. And even though judgments should be recovered on such prior debts subsequent to the date of the equitable mortgage, for the same reasons such judgment creditors will have no such fixed lien upon the land as to exclude or defeat the security of the equitable mortgage. At the time of the execution of the defective instrument, the mortgagor had full and complete power of conveying or charging the land, and having so agreed to charge it, he will be held in equity to have actually charged it, and a court of equity will enforce the charge.

In the case of *Dyson v. Simmons,* 48 Md. 207, a mortgage had been defectively executed, so that an equitable mortgage was held to exist. The mortgagor had a number of judgment creditors, some upon debts created prior and some upon debts created subsequent to the making of the equitable mortgage. As between themselves, the judgment creditors were entitled

to the benefit of their liens on the land, acording to their priority in date; but as against the equitable mortgagee, those judgments rendered on prior contracts must be subordinated, and made to give place, to the mortgage, if that should be necessary for the payment of the mortgage debt. The judgments rendered on contracts or causes of action existing at the date of the mortgage were taken in their inverse order of date, and the distributions made to them, or which would have been made to them but for the mortgage, must be applied to the mortgage debt instead of the judgments; i. e., the last judgment rendered at the date of the mortgage must be the first to yield to the mortgage, and so on in the inverse order of the judgments for debts or claims antedating the mortgage. To whatever distribution those judgments would have been entitled, if the mortgage had not been made, the mortgagee will be entitled by substitution, to the extent of full payment, if the distribution to such judgments be sufficient for that purpose. But the judgments rendered or contracts made after the date of the mortgage, whatever may be the order of their rendition, remain unaffected by the mortgage; they are entitled to distribution in their order of priority as if the mortgage had not been made.

CHAPTER XXXVII.

REDEMPTION, SATISFACTION AND PAYMENT OF MORTGAGES.

Not only the mortgagor, but his heirs or personal representatives or assignees and every other person having a legal or equitable interest in, or lien on, the property will be entitled to redeem the mortgage by payment of the mortgage debt. Thus, tenant for life, judgment creditors, jointress, tenant by the curtesy, a tenant in dower in some cases, reversioner, remainderman, etc., may redeem. *Bldg. & Loan Asso. v. Middleton,* 112 Md. 10, 15. But the entire mortgage debt and interest must be paid or tendered in order to entitle the party redeeming to claim the intervention of a court of equity. *McNiece v. Elaison,* 78 Md. 168, 177; *Snook v. Zentinyer,* 91 Md. 485, 487.

If there is a tender of the mortgage debt at the time, and in the manner, prescribed in the condition of the mortgage, and the mortgagee refuses to receive it, the condition is complied with, and the mortgage ceases to be a security on the land, although the mortgagor may still be liable for the money. *Bldg. & Loan Co. v. Middleton,* 112 Md. 10, 17.

But to produce such a result the money really due must be tendered *by a person having a right to make a tender,* because a valid tender can be made only by the person, or the agent of the person, who has the right to pay the debt, such as the debtor himself, or his representatives, or the holder of the title to the estate or property on which the debt is a lien, or the holder of some subsequent lien having an equity of redemption. *Bldg. & Loan Asso. v. Middleton,* 112 Md. 10, 15. A

tender by a stranger is not good, and does not operate to release the lien of the mortgage. *Grafflin v. State,* 103 Md. 171, 178.

Where there has been no default in the mortgage, so that the estate has never become absolute in the mortgagee, or to put it a little differently, where the mortgagor has performed the condition subsequent by payment of the mortgage debt, etc., at or before maturity, the estate by the terms of the mortgage, by the performance of the condition, *ipso facto* revests in the mortgagor. In equity, even after default, the payment of the debt, of itself, and without any other circumstances, extinguishes all rights of the mortgagee. The mortgage, is, in equity, only a security for the debt, and cannot survive after it is paid. *Carter v. Van Bokkelen,* 73 Md. 175, 180.

No formal release of the mortgage is absolutely necessary, although it is much better to have the mortgage released of record. *Brown v. Stewart,* 56 Md. 421, 431; *Evans v. Bulman,* 91 Md. 84, 88.

A mortgage may be released in three different ways:

By what is known as a *long release*—a formal deed of release by the mortgagee reciting the payment of the mortgage debt and the performance of all the covenants and conditions by the mortgagor, and reconveying the mortgaged property to the mortgagor to hold as if the mortgage had never been made.

By a *short release,* as provided for by Code, Art. 21, Sec. 34. "I hereby release the above (or within) mortgage. Witness my hand and seal, this.....day of....., 19... (Seal.)" No witness is required by this form.

This short release may be written by the mortgagee or his assignee upon the record at the foot of the mortgage, and attested by the clerk of the court in which the record is kept. Or it may be indorsed on the original mortgage and delivered to the clerk, who is thereafter required to retain the mortgage.

A short release has all the effect and virtue of a long release. Code, Art. 21, Secs. 35, 38.

By entry in a foreclosure case.—In foreclosure under an assent to a decree, the entry upon the docket of the satisfaction of the decree and the discharge of the mortgage claim made by the person entitled to receive the claim shall have the same effect as a release; but such entry shall not be made without an order in writing, acknowledged before the judge or a justice of the peace (notary public, Act of 1910, Ch. 157) by the person purporting to sign the same. Baltimore City Code, 1906, Sec. 728. There is no similar provision in the case of a foreclosure under a power of sale.

In the case of all mortgages executed prior to the passage of the Act of 1892, Ch. 392—that is, prior to April 7, 1892—whether released before or after maturity, it is necessary to require the production and cancellation of the mortgage notes, if any, before we can be sure that the mortgage has been validly released. In the case of mortgages executed between April 7, 1892 and June 1, 1910, and released prior to maturity, the same precaution is advisable, as the Act of 1892 seems to apply only to cases where the notes or debts have matured.

A mortgage lien will be extinguished by the running of limitations. *Taylor v. Carroll,* 89 Md. 32, 36.

CHAPTER XXXVIII.

OTHER LIENS.

THE LIEN FOR OWELTY OF PARTITION.

In the case of partition of joint estates, where an equal division cannot be made between the co-tenants, the court may order that a certain sum be paid to the other parties by the party to whom the more valuable part is allotted. This sum is called *owelty of partition,* and is a lien upon the part of the land upon which it was imposed, and if not paid, may be recovered by appropriate proceedings in equity. The period of limitations in the case of owelty is twenty years. *R. R. Co. v. Trimble,* 51 Md. 99, 107. Similarly, the bonds given in payment of the purchase price in the case of a partition under the provisions of Article 46, are liens upon the land for the purchase price of which they have been given. Code, Art. 46, Sec. 51.

MECHANICS' LIEN.

This is a lien of purely statutory origin. Code, Art. 63. It is fully treated in "Practice." Poe's Practice, Ch. 30.

JUDGMENT LIENS.

The consideration of the subject of judgments, the method of their obtention, their quality and characteristics are fully treated in "Practice." Poe's Practice, Secs. 374-378. By the provisions of Code, Art. 26, Sec. 19, amended by the Act of 1890, Ch. 314, judgments rendered by any of the courts of law of this State shall be and constitute a lien, to the amount and from the date thereof, upon all leasehold interests and

terms of years of the defendants in land, except leases from year to year and leases for terms of not more than five years, and not renewable, to the same extent and effect as liens are created by judgment upon real estate.

There is no statute which declares that a judgment rendered in a court of law shall be a lien on real estate. A judgment is a lien upon land, only because it may be sold under execution to satisfy the judgment. As a consequence of this doctrine, it follows that, as a judgment creditor of the husband cannot sell property held by the entireties by the judgment debtor and his wife, since so to do would interfere with the wife's estate; such judgment creditor, therefore, has no lien of any character against such property or the husband's interest therein. *Jordon v. Reynolds,* 105 Md. 288, 292, etc.

As an interlocutory judgment by default is not a final judgment, it is not a lien. *Davidson v. Myers,* 24 Md. 538, 555. The lien attaches from the date of the rendition of the final judgment. *Anderson v. Tuck,* 33 Md. 225, 233.

Judgments rendered by justices of the peace will become liens on the real and leasehold estates, except leases from year to year and non-renewable leases for five years or less, of the judgment debtor in the county or city where rendered, whenever the judgment creditor shall file a copy of the judgment under the hand and seal of the justice by whom the same was rendered with the Clerk of the Superior Court of Baltimore City, or with the Clerk of the Circuit Court for the county, as the case may be, where said judgment was rendered, to be recorded by the clerk, and such judgments shall be liens from the date of such recording. Code, Art. 53, Secs. 36, 37; Act of 1890, Ch. 402.

NATURE OF JUDGMENT LIEN.

The lien of a judgment is a general, and not a specific, lien. The interest of a judgment creditor is quite different from

that of a mortgagee of the land. The mortgage is not only a lien, but is a transfer of the specific property itself, as security for the debt. *Georgetown College v. Perkins,* 74 Md. 72, 75. The judgment lien is said to be neither *jus in re* nor *jus ad rem.* It will always be subordinated to the superiority of a prior specific lien, even though created by a defective mortgage or conveyance. *Dyson v. Simmons,* 48 Md. 207, 215; *Supply Co. v. McColgan,* 100 Md. 479.

After the date of the judgement, all persons dealing with the judgment debtor's property, thus subject to the lien thereof, acquire rights, if any, subject to the lien of the judgment, as such persons are presumed to have notice of the judgment. *Ahern v. White,* 39 Md. 409, 418. Both legal and equitable estates in any lands, tenements and hereditaments may be seized and sold under execution. Code, Art. 83, Secs. 1, etc. Consequently, the judgment lien attaches to both legal and equitable estates upon the principles already considered. *Shryock v. Morris,* 75 Md. 72, 79.

A judgment is a general lien on all of the estate of the character already considered which the judgment debtor owns at its date, and attaches on all that he may thereafter acquire during the life of the judgment. *Ahern v. White,* 39 Md. 409, 417.

We have already seen that purchase-money mortgages are accorded priority over already existing judgments against the purchaser.

DURATION OF JUDGMENT LIEN.

The lien of the judgment continues effective for twelve years from its date. Code, Art. 26, Sec. 20; Act of 1890, Ch. 114. And may be kept alive indefinitely by the proceedings described in Poe's Practice, Sec. 376. The lien is not lost where a stay of execution is granted, whether by act of the judgment creditor, by an appeal by the debtor and the filing

of an appeal bond, by the granting of an injunction by a court of equity, or by *supersedeas.* The lien continues, but its enforcement is suspended.

EXTENT OF JUDGMENT LIEN.

As a rule, the judgment lien is co-extensive with the jurisdiction of the court which renders judgment. The judgments of the Court of Appeals are liens on the defendant's real and leasehold estates as above designated in any part of the State. *U. R. & Elec. Co. v. Corbin,* 109 Md. 52, 61, and so are the judgments rendered by the Federal Courts for the District of Maryland. Poe's Practice, Sec. 377.

Judgments including magistrates' judgments, rendered in one county or Baltimore City, are liens only on the judgment debtor's property in that county or city, but may be made liens upon his property in any other county by recording upon the judgment records of the court of that county a certified copy of the docket entries from the clerk of the court where any judgment has been obtained or any magistrate's judgment originally recorded. Code of 1888, Art. 26, Sec. 19, amended by Act of 1890, Ch. 314.

A decree of a court of equity for the payment of money is likewise a lien to the same extent and in the same manner as a judgment at law. Code, Art. 16, Sec. 170, Act 1908, Ch. 661.

ATTACHMENT AND EXECUTION LIENS.

Any kind of property may be seized under an attachment in this State. Code, Art. 9, Sec. 10, etc.; Code, Art. 5, Secs. 70, 71. Executions in Court of Appeals. *U. R. & Elec. Co. v. Corbin,* 109 Md. 52, 60; and when so siezed becomes subject to an inchoate lien in favor of the attaching creditor. This inchoate lien becomes a perfected lien upon the rendition of a judgment in his favor in the shortnote case, and the rendi-

tion of a judgment of condemnation against the property attached.

Any person dealing with the attached property, subsequent to the levying of the attachment, will acquire any rights thereto, subject to the lien of the attachment, and successive attachments, acquire successive liens, in accordance with their respective priorities. Upon the obtention of a judgment in a short-note case by the attaching creditor, he becomes entitled to a judgment of condemnation against the attached property, which may be enforced by a sale under a *fieri facias*. Code, Art. 9, Sec. 12, 28, 29; Poe's Practice, Secs. 520, 551, 552.

Inasmuch as in this State, as we have already seen, the rendition of a judgment *ipso facto* creates a lien upon the real and leasehold (above five years) estates of the judgment debtor, the lien thereon which arises from the seizure of such estates upon a writ of *fieri facias*—issued upon such a judgment is of no practical importance, and need not be considered.

LIENS FOR TAXES AND ASSESSMENTS.

By Code, Art. 81, Sec. 47, all State, county and municipal taxes are made liens upon the real estate of the party indebted from the time the same are levied. This lien is enforceable by the sale of the real estate. Code, Art. 81, Sec. 49; Baltimore City Code, 1906, Secs. 42-51.

All county and city taxes shall be collected within four years after the levy thereof, and if not collected within four years, limitations will be a valid defense in a subsequent attempt to collect them. Code, Art. 81, Sec. 83.

There is no limitation upon the right of the State to collect taxes.

What are known as street charges consist of assessments levied upon property benefitted by public improvements such as opening and closing streets, paving, widening and otherwise improving them. Such assessments are liens for the amount

of benefits or costs and expenses charged against the property benefitted. Baltimore City Code 1906, Sec. 185, and are usually made collectible in the same manner as taxes are collected. Baltimore City Code 1906, Sec. 6.

LIEN OF DECEDENT'S DEBTS.

When a person dies leaving real estate, and not leaving personal estate sufficient to pay his debts and costs of administration, the real estate may be sold in an equity suit brought by the creditors. Code, Art. 16, Sec. 188, Act 1890, Ch. 320; *McGaw v. Gortuer,* 96 Md. 489, 492.

The land of a deceased person is thus subject to the quasi-lien of his debts and is liable to be sold to pay the same, if the personalty is not sufficient for that purpose. A purchaser from the heirs and devisees of a decedent can only be sure that this lien does not exist where the records of the Orphans' Court show a final settlement of the personal estate according to law, after notice to creditors, and when the administration account shows that all proved debts and costs of administration have been paid in full, and there is still a balance in the hands of the administrator. One who purchases real estate under such circumstances, without knowledge of any other debts of the decedent, will take the property free from the lien of such other debts, even though they should aggregate more than the amount of such personal estate. *Van Bibber v. Reese,* 71 Md. 608; *Scarlett v. Robinson,* 112 Md. 202, 210.

As personal property is primarily liable for the debts of its deceased owner, leasehold property is thus primarily liable for such debts, which, therefore, will constitute a lien upon such estates.

LIEN OF COLLATERAL INHERITANCE TAX.

All estates, real and personal, passing from any person who may die seised and possessed thereof, being in this State, to

any person, in trust or otherwise, other than to or for the use of the father, mother, husband, wife, children and lineal descendants of the decedent, shall be subject to a tax of 2½% (5% by Act of 1908, Ch. 695) of the clear value thereof, provided that such estate shall be valued at not less than five hundred dollars. The amount of said tax shall be a lien on said real estate from the death of the decedent, who shall have died seised and possessed thereof for the period of four years from the date of such death. Code, Art. 81, Secs. 102, 113, Act of 1904, Ch. 222; Act of 1908, Ch. 695.

LIEN OF STATUTORY PREFERRED STOCK OF CORPORATION.

Statutory preferred stock of a Maryland corporation issued prior to 1908 was declared by statute to be a lien, somewhat similar to a mortgage, on the property of the corporation, and it has priority over subsequent mortgages and incumbrances. Code, Art. 23, Sec. 294; *Heller v. Bank,* 89 Md. 602, 617.

This lien arises only in case of statutory preferred stock issued under the provisions of the Code, prior to the going into effect of the Act of 1908, Ch. 24D. It does not exist in the case of ordinary preferred stock issued independently of the statute and by agreement between the various classes of stockholders. France on Corporations, Secs. 41, 96, 97; *Scott v. R. R. Co.* 93 Md. 475. The preferred stock provided for by Acts of 1908, Ch. 240, Sec. 34, does not possess this lien.

BAIL BOND OR RECOGNIZANCES IN BALTIMORE CITY.

These are liens upon the property of the recognizor. Act of 1898, Ch. 138, Sec. 207A-K. By Sec. 207E, it is provided that every recognizance taken in any criminal proceeding in Baltimore City shall be a lien upon the property of the recognizor offered by him as bail from the date of the acknowledgment by him of the recognizance. If the recognizance has been acknowledged before a police magistrate or before a court

upon a writ of *habeas corpus,* it shall become a lien from the time it is filed with the Clerk of the Criminal Court of Baltimore City. When any recognizance is forfeited, it becomes a judgment, and has all the effect of a judgment rendered in a civil cause, and may be enforced by order of the State's Attorney at any time within six years from the date of the forfeiture, and not afterward. By Sec. 207F, the Clerk of the Criminal Court is required to keep a recognizance docket and to make appropriate entries thereon.

CHAPTER XXXIX.

LIS PENDENS.

By the doctrine of *lis pendens,* we understand the doctrine whereby one purchasing land from a party to a pending litigation concerning such land takes subject to the results of such litigation. Pending litigation, a party thereto cannot transfer his right in the land involved in the litigation to others so as to prejudice another party to the litigation, since otherwise the decision of the court therein might be rendered utterly ineffectual. *Sanders v. McDonald,* 63 Md. 503, 512. The rule that *lis pendens* is notice to all the world is founded upon public policy to prevent alienations during the suit and endless litigations. *Applegarth v. Russell,* 25 Md. 317, 323; *Millikin v. Platt,* 115 Md. 480, 486.

This doctrine is applied to proceedings affecting land both at law and in equity. An action of ejectment at law operates as a *lis pendens;* a suit in equity to foreclose a mortgage or to enforce any other lien; to establish a trust in the land, to set aside a conveyance thereof, as in *Applegarth v. Russell,* 25 Md. 317, 323; to enforce specifically a contract for the sale of the land, etc. *Marshall v. Whately,* 136 Ga. 805, 36 L. R. A. N. S. 552 note, are examples of suits in equity operating as *lis pendens.* To constitute a *lis pendens,* the bill or declaration must have been filed and the subpœna or summons served on the defendant. *Sanders v. McDonald,* 63 Md. 511. Thus, one who accepts an assignment of a mortgage after a bill is filed involving the land covered by the mortgage, is subject to the doctrine of *lis pendens* if the subpœna is served upon the defendant before the assignment. *Baker v. Baker,* 108 Md.

269, 273. A purchaser is affected with notice only if the land is described with reasonable certainty in the pleadings in the litigation. A purchaser from a person not a party to the pending litigation concerning the land is not affected with notice thereof. 2 Tiffany on Real Property, Sec. 487.

The doctrine of *lis pendens* has no application except where there is a proceeding directly relating to the thing or property in question. Thus, in a proceeding by the wife against her husband for alimony, the husband, pending the suit, made a *bona fide* sale for value of a part of his property. The doctrine of *lis pendens* could no more apply to this case than to a pending action at law to recover an ordinary debt. *Lis pendens* is a proceeding directly relating to the thing or property in question. *Feigley v. Feigley,* 7 Md. 537, 563. But by Code, Art. 81, Sec. 142, all lands belonging to any person indebted to the State of Maryland, after the commencement of a suit thereon against him, shall be liable to execution on any judgment or decree which may be rendered against him in such suit, in whosoever's hands or possession the said lands or tenements may be found. This does not apply to any roadway or easement in or over any lands liable as aforesaid which the debtor may have granted or may hereafter grant.

When a bill in equity is filed in one county of this State for the partition or sale of property lying partly in one county and partly in another, such suit is not *lis pendens* so as to affect a purchaser of the property in the latter county, until copies of the proceedings are filed in the court of the latter county. Before notice is presumed from the pendency of the suit, all conditions to the obtention of jurisdiction by the court both as to the subject-matter of the litigation and the parties thereto must have been complied with—for example, service of subpœna upon defendant; filing of copy of bill of complaint in the county where land lies. *Murguiondo v. Hoover,* 72 Md. 9, 17.

In order, however, that a purchaser *pendente lite* may take subject to the outcome of the litigation, the suit must be prosecuted in good faith, with all reasonable diligence and without unnecessary delay. A neglect to comply with this requisite would relieve a purchaser from the effect of the *lis pendens* as notice. If the claimant failed in diligent prosecution of the action, the consequences are the same as if no action had been begun. *Taylor v. Carroll,* 89 Md. 32, 36; 44 L. R. A. 479.

INDEX

Compiled by CHARLES PIELERT, ESQ.

ABANDONMENT.
See DEDICATION.
Mere non-user not conclusive proof of..... 186
Change of route by railway company—when an abandonment of old route..... 186
Of dedicated land or easement..... 191
Public highway lost by..... 186
Title by.....184-186
Abandonment defined..... 186
Non-user for 20 years, effect..... 184
Easements, extinguishments by acts *in pais*..... 184
Acts amounting to abandonment..... 185
Estoppel to deny abandonment..... 185

ACCEPTANCE OF DEEDS.
See DEEDS.

ACCOUNTS.
Of Mortgagee in possession—(See "Mortgages").
Of Sales—(See "Executors and Administrators").

ACCRETION.
Improvements by riparian owner.....181-183
Become incidents of land to which attached.....182-183
Nature of right to improve..... 182
Become fee simple property..... 182
Owner may alienate independently of land to which attached..... 183
Restrictions thereon..... 183
Owner of perpetual leasehold has rights of..... 183
Acquires fee to made land..... 183
Lots of curved or irregular shore front..... 183
Riparian owner acquires title to accretion.....88-89
Title by.....181-183
Defined..... 181
Rights conferred by statute on reparian owners.....181-183
Common law doctrine..... 181
Rights under Federal jurisdiction..... 181

ACKNOWLEDGMENTS.
See DEEDS.
Mortgages 243
Creates presumption of delivery..... 118
Recording deed defective as to or without..... 133
Certified copy not evidence..... 134

ADMINISTRATION.
Account, effect in devolution of title.....35-37
Common law doctrine..... 34
Leasehold estates—title devolves through.....34-37
Rule as to specific bequests..... 35
Personal property—title to transmitted by..... 34
Statutory provisions.....34-37

ADMINISTRATORS.
See EXECUTORS and ADMINISTRATORS.
Required to pay mortgage debt on realty of decedent..... 255

ADOPTED CHILDREN.
Descent of property of..... 30
Statutory provisions..... 30

ADVANCES.
Future, mortgage to secure.....

ADVANCEMENT AND HOTCHPOT.
Advancement defined..... 30
Of Statutory origin..... 31
Hotchpot—when advancement must be brought into.....30-33

ADVERSE POSSESSION.
See LIMITATIONS and PRESCRIPTION.
As a mode of perfecting title..... 2
Origin of doctrine of..... 157
Early English statutes..... 157
Maryland law on subject..... 158
Term defined..... 158
Elements of..... 159
Actual Possession.
What are deemed evidences of and what not..... 159
Payment of taxes.....159-160
Land under water..... 160
Inclosure, exclusive user and ownership..... 160
Color of title..... 161

ADVERSE POSSESSION—Continued.
Constructive possession..... 161
"Color of title"..... 161
Occupany under some writing necessary..... 161
Writings sufficient to establish..... 161
Owner's actual possession of part a bar..... 162
Paramount to rights of a mere wrongdoer..... 162
Continuous Possession.
If held for 20 years creates good title..... 165
Purchaser must take property in such case..... 165
Leaseholder acquires fee when rent not paid for 20 years..... 166
Interruption arrests running of statute..... 166
Persons entering in succession cannot tack possessions 166
Successive occupants in privity of estate may tack.... 166
Once statute begins to run it will continue..... 167
Docketing of suit to recover land arrests limitations 167
But only if within statutory limit..... 167
Otherwise actual entry necessary..... 167
Exclusive Possession.
Owner must be entirely excluded..... 164
Tenant in common in exclusive possession does not have 164
But such tenant's grantee may be deemed to have.. 164
Hostile Possession..... 164
Entry must not be permissive..... 162
Cannot arise out of relation of tenant..... 163
Non-payment of rent as evidence of..... 163
Acts of agent cannot create..... 163
Occupancy by mistake is not..... 163
Visible Possession..... 162
Notorious Possession..... 162
Leasehold estates for 99 years may be acquired by..... 166
Persons under disability.....168-171
Prior to Act 1894, ch. 661..... 168
Subsequent thereto..... 170
Cumulative disabilities—effect of.....168-171
Statute does not run until the extended period expires.... 168
Road or street acquired by public by.....203-204
Mortgage foreclosure under power of sale..... 235

AFFIDAVIT.
Of mortgagee as to consideration of mortgage.....243-245
As to taxes on interest..... 245
AFFINITY.
See HEIRS.
AFTERBORN CHILDREN.
Rights of inheritance..... 27
AGREEMENTS.
To execute mortgage—equitable mortgages..... 271
ALIENATION.
As affecting descent..... 21
ALLEYS.
See DEDICATION.
Dedication of..... 189
Grants of land binding on.....89-91
ALLOWANCES.
To mortgagee in possession for repairs..... 241
ALTERATIONS.
In deeds after delivery..... 120
ANTECEDENT DEBT.
As consideration for deed..... 74
APPEAL FROM DECREE.
Effect on title of purchaser at sale under..... 151
APPURTENANCES.
See DEEDS.
ASSESSMENTS.
Liens for..... 283
ASSIGNEE.
See LEASES and VENDOR'S LIENS.
Of mortgage—(See "Mortgages").
Liable for rent of mortgaged premises..... 101
Power of sale exercised by..... 236
Of mortgaged leasehold, rights and liabilities..... 240
Of mortgaged premises—when bound to pay mortgage debt 255, 256
ASSIGNMENT.
See CONVEYANCES; DEEDS; VENDOR'S LIENS.
Of Mortgages—(See "Mortgages").

ASSIGNMENT OF MORTGAGE.
Attestation of..... 245
Not essential to validity of..... 107
ASSUMPSIT.
Recovery of debt by vendor by..... 225
ATTACHMENT LIENS.
When and how created..... 283
How enforced..... 283
ATTESTATION—
Of Deeds—(See "Deeds").
Of Mortgages..... 246
ATTORNEY.
See POWER OF ATTORNEY.
BAIL BOND.
Lien in Baltimore City..... 285
BALTIMORE TOWN.
Act of incorporation—rights conferred on owners of harbor lots..... 182
BARGAIN AND SALE.
See CONVEYANCES.
Deeds construed as..... 57
BONDS OF CONVEYANCE.
See BONDS; VENDOR'S LIEN.
BONDS.
Conveyance of real estate—recording necessary..... 132
Sales under consent to decree—mortgage foreclosure..... 236
Sales under power in mortgage..... 235
BURDEN OF PROOF.
See TAX TITLES.
BURIAL GROUNDS.
Dedication of land for..... 189
Proceedings for sale of.....148-151
CAVEAT.
To patents from State..... 39
CAVEAT EMPTOR.
Doctrine applies to sales under decrees..... 150
CEMETERIES.
Use of land for not a public use..... 216

CHANGE OF INVESTMENT.
Procedure 148-151
CHATTELS.
Mortgage of 253
Vendor may sell on default 225
CHRISTIAN NAMES.
See NAMES.
CHURCHES.
See CORPORATIONS.
CIRCUIT COURT (COUNTY).
Acknowledgment taken by judge of 111, 112
CIVIL LAW.
See DESCENT.
CLERKS OF COURTS.
Recording or registration—duties and records of 127
Indexes of records 127
Baltimore City records 127
Mode of recording 127
Fees of clerk 127
COLLATERAL HEIRS OR RELATIONS
See DESCENT; HEIRS.
Of the half blood 28
COLLATERAL INHERITANCE TAX.
Lien of 284-285
COLLATERAL SECURITY.
See VENDOR'S LIEN.
COLOR OF TITLE.
See ADVERSE POSSESSION.
COMMISSIONERS OF DEEDS.
Acknowledgments before 113
COMMON LAW.
See DESCENT.
Common law dedication—(See "Dedication").
Conveyances under—(See "Conveyances").
COMPENSATION.
See EMINENT DOMAIN.
CONDEMNATION PROCEEDINGS.
See EMINENT DOMAIN.

CONDITIONS.
See CONVEYANCES; DEDICATION; DEEDS.
CONFISCATION.
Title by 207
Of land of persons supporting royal cause during American Revolution 207
CONSANGUINITY.
See HEIRS.
CONSIDERATION.
See CONVEYANCES; DEEDS; MORTGAGES.
Deeds dedicating land, etc 198
In a covenant to stand seized 50
Mortgage, affidavit of mortgagee 243-245
To support a bargain and sale 52
CONSOLIDATION OF MORTGAGES.
See MORTGAGES; sub-title TACKING OF MORTGAGES.
CONSTITUTION OF MARYLAND.
Eminent domain, provisions relating to 212, 213
CONSTRUCTION OF DEEDS.
See DEEDS.
Conflicting descriptions 93
Grantee favored 93
Misdescription of property 92
Overlapping descriptions 93, 94
Parole evidence, admissibility 92
Senior and junior conveyances 94
CONSTRUCTIVE NOTICE.
See RECORDING OR REGISTRATION.
CONSTRUCTIVE PARTIES.
See SALES.
CONTRACTS.
Conveyance of real estate, recording necessary 132
CONVEYANCES
See CONSIDERATION; CREDITORS; DEEDS; MORTGAGES; PATENTS; POWER OF ATTORNEY; PURCHASE, TITLE BY; RECORDING AND REGISTRATION.
Acknowledgment of 108-117
Curative acts 114
What officers may take 111

CONVEYANCES—Continued.
Classification of..... 40
Common Law Conveyances.
Assignments 46, 47
Statutory requirements..... 47
Still valid in this State..... 55
Exchange 47, 48
Defined 47
Common Law Aspects.....47, 48
Who may make..... 47
Statutory modifications..... 48
Livery of seizin unnecessary..... 48
Valid in this State but obsolete..... 55
Feoffment or livery of seizin.....40-42
When available 41
What passed by.....41, 42
How affected by Statute of Frauds—Feoffment valid in this State..... 55
Livery of seizin abolished..... 41
Operating words..... 42
Fines and Recoveries..... 42
Object thereof..... 42
Accomplished by fictitious or collusive suit..... 42
Still valid in Maryland but obsolete..... 55
Forms which are obsolete..... 55
Grants 43
Characteristics 43
Distinguished from feoffment..... 43
Operating words..... 43
Valid in this State..... 55
Leases 43, 44
Aspect at common law.....43, 44
Statutory modifications..... 43
Operating words..... 44
When to be in writing..... 43
Releases 44, 45
Use at common law..... 44
Operating words..... 44
Illustrations of use.....44, 45
Restrictions 45
Livery of seizin unnecessary..... 48
Valid in this State..... 55

CONVEYANCES—Continued.
Still valid in Maryland..... 55
Surrender 45, 46
Legal effect..... 46
Express and implied..... 46
Writing required..... 46
Livery of seizin unnecessary..... 48
Valid in this State..... 55
Covenants 96-103
General warranty..... 96
Special waranty..... 97
Against encumbrances..... 98
Further assurance 98, 99
Quiet enjoyment..... 101
Real covenants.....100, 101
Personal covenants 101, 102, 103
Delivery 116-121
Date of deed..... 118
In escrow..... 120
Description of property.....83-95
Binding on water..... 87
Binding on highways..... 89
Conflicting descriptions..... 93
Appurtenances 94
Parol evidence to explain deeds..... 92
"Grant" legal effect of word..... 57
Grantor must be competent to convey..... 66
Must act voluntarily with full knowledge..... 66
May avoid deed procured by fraud, force, duress or undue influence 66
Rights of innocent third party..... 66
Modern conveyances..... 40
Modes of conveyance..... 40
Of mortgaged property—(See "Mortgages").
Quit claim deeds..... 56
Statute regulating modern forms..... 56
Under Statute of Uses.
Provisions of statute.....40-49
Bargain and Sale.....51-54
Defined 51
Operative words..... 51

CONVEYANCES—Continued.
Differentiated from—
—covenant to stand seized..... 52
—feoffment—importance of this distinction.....52-53
When deed may be construed a feoffment and not bargain and sale.....53-54
Valid in this State..... 55
Covenant to stand seized.....50-51
When operative..... 51
Requirements 51
Effect on old modes of conveyance..... 49
Feoffment and livery of siezin abolished.....49-50
Forms of conveyance evolved thereunder..... 50
Lease and Release.....54-55
Form of conveying freehold..... 54
Case cited..... 55
Still valid in this State..... 55

CONVICTS.
No forfeiture of estates of..... 207
Rule at common law..... 207

CORPORATIONS.
See TITLES OF VARIOUS CLASSES OF CORPORATIONS.
Deed of church corporation..... 106
Foreclosure of mortgage by..... 236
Grants to..... 77
Misnomer of in deeds.....68-69
Mortgage of property of..... 253
Statutory preferred stock a lien on property of..... 285

COVENANTS.
See CONVEYANCES; DEEDS; LEASES; MORTGAGES.
Effect on granting clause..... 82
For easements..... 126
Implied in favor of grantee of lot on dedicated street.....195-202
In deeds—(See "Deeds" and "Estoppel").
In mortgages.....251-253
To stand seized—(See "Conveyances").

CREDITORS.
See ASSIGNMENTS; DEEDS; DEEDS OF TRUST; JUDGMENTS; MORTGAGES; RECORDING OR REGISTRATION.
Assignee for benefit of not a *bona fide* purchase for value.. 128
Conveyances in fraud of.....72-74

CREDITORS—Continued.
Curative acts not to affect rights of..... 115
Deed of trust for benefit of.....247-249
Judgment creditor not a *bona fide* purchaser for value..... 144
Rights affected by recording of mortgage..... 247
Rights as against equitable mortgagee..... 274
Suit by, procedure.....148-151
When bound by vendor's lien..... 223
CROPS.
Assignment of growing crops by mortgager..... 238
CURATIVE ACTS OF ASSEMBLY.
Acknowledgments 114-115
Deeds of married women..... 64
DAMAGES.
In condemnation proceedings.....216-218
DEBT.
As consideration for a deed..... .129
Decedent's debts a lien..... 284
Subrogation of person paying mortgage.....267-270
DECEASED PERSONS.
Debts of a lien..... 284
Deeds to void..... 67
Proceeding relating to sale of property of.....148-151
Unknown heirs of..... 149
DECREE.
Against mortgagee in possession for accounting..... 241
Binding on parties and their privies..... 174
Confer title by way of estoppel.....174-175
For recording mortgage after six months.....130-136
Mortgage foreclosure proceedings in Baltimore City.....236-237
In personam against mortgagor.....234-236
Sales under.....148-151
DEDICATION.
Acceptance by public renders dedication irrevocable..... 202
By whom to be made to vest ownership and control in authorities 202
Such acceptance may be express or implied..... 202
Form of express acceptance..... 202
Implied acceptance..... 203
User or prescription by public for 20 years vests title.... 203
Status of a dedicated and accepted highway..... 204

DEDICATION—Continued.
Common law dedication.
Are express and implied..... 188
Essential elements of..... 188
Express grant, dedication by..... 188
Grantee, who may be..... 188
Municipal corporations as..... 188
Public and private easements distinguished.....188-189
Form of Common Law Dedication
No particular form or ceremony..... 193
Acts *in pais* amounting to dedication sufficient..... 193
Intention may be express or implied.....193-194
Implied dedications..... 194
Conditions imposed by dedicator.....191-192
Must not be illegal or against public policy..... 192
Must be for benefit of whole public.....190-192
Examples of invalid dedications..... 192
Conditional dedication.....191-192
Declaration denying intention to dedicate defeats dedication 193-200
Doctrine of implied covenant in favor of grantee.....197-207
When covenant arises.....197
Acceptance by public works dedication without covenant 197
When covenant is extinguished..... 197
Limitation on extent of easement thereunder 198
Conveyance need not be upon valuable consideration.... 198
Elements essential in order that dedication may occur thereunder 190
Retention of fee by owner essential..... 199
Rebuttal of implication of covenant..... 200
Until accepted by the public dedication is revocable if no such grantee..... 197
When title to whole land vests in one grantee..... 197
Estate created by..... 191
Estate where grant is implied..... 191
Public use is measure of implied grant..... 191
Reverts to owner on abandonment..... 191
How accomplished.
Dedication is an offer..... 192
Elements of dedication..... 192
Acts of dedication and intention to dedicate necessary..192-193

DEDICATION—Continued.
Implied or presumptive dedications.
Are of two kinds..... 194
Where owner does acts which imply dedication..... 194
Where owner is estopped to deny dedication..... 194
Easement of right of way passing with lot fronting thereon 195
Private right of way accompanying lot sold..... 195
Street designated on plot from which lot is sold..... 195
Parks, different principles applied..... 196
Size of lots on plat, owner may change..... 196
No dedication by mere recording of plat of lots and streets 197
But sale of a lot completes dedication..... 197
Is a question of intention..... 200
Of public highway by acts *in pais*..... 179
Proceedings to enforce public rights acquired by.....204-205
Who may bring action..... 204
Municipality may maintain injunction suit..... 204
Ejectment not a remedy..... 204
Right of owner of fee to bring ejectment.....204-205
Easement of public is paramount..... 205
Public uses for which may be made.
Highways, streets, etc..... 189
Burial grounds..... 189
Parks, squares, commons, etc..... 189
School purposes..... 189
Wharves or landing places..... 189
Sewer purposes..... 189
Whole public, use must be intended for.....190-192
Title by.....187-205
Defined 187
Statutory dedication..... 187
Statutes relating to..... 187
Prerequisites to effect such dedication..... 187
When revocable.....197-202
Who may dedicate land.....190-191
Who cannot dedicate land..... 191

DEEDS.
See CONVEYANCES; MARRIED WOMEN; MORTGAGES; POWER OF ATTORNEY.
Acceptance, effect of..... 60

DEEDS—Continued.
Acknowledgment of—
By corporations..... 110
By married women..... 111
Certificate of.....108-113
Probative effect..... 113
May be impeached..... 113
But not by officer taking, except as to certain facts 113
Seal, when necessary.....112-113
Curative acts.....114-115
Defects cured.....114-115
Defects not cured..... 115
Defective 114-115
Defined..... 108
Form of certificate of..... 108
Examples of.....109-110
When sufficient..... 109
Forms held invalid.....109-110
Special requirements.....112-113
Object of..... 108
Officers who may take.....111-113
Where land lies..... 111
Within state but out of county or city..... 112
Without state but within United States..... 112
Without United States..... 113
Probative effect of..... 113
Resume of statutes regulating..... 111
Statutory requirements.....108-110
Attestation not essential except by statutory requirement..... 246
Clauses with repugnant parts..... 82
Consideration—
Generally 70
May be good or valuable..... 70
Admissability of evidence relating to..... 71
Not necessary to validity of deed.....70-72
Voluntary transfers..... 72
Valid as between parties..... 72
Voidable if in fraud of creditors..... 72
Burden of proof.....72-73
Void if not *bona fide* although full consideration paid 73

INHERITANCE, ESTATES OF.
Deeds creating or conveying must be recorded..... 132
INJUNCTION.
Effect upon judgment lien..... 282
Public easements, as a remedy to enforce rights in..... 204
INSANITY.
See LUNATICS.
INSOLVENCY.
Effect on deed of trust by corporation..... 249
INSURANCE.
Covenant to pay..... 101
Covenant in mortgage relating to..... 251
INTEREST.
See MORTGAGES.
INTERLOCUTORY JUDGMENT.
See JUDGMENT LIENS.
INVENTORY.
See EXECUTORS and ADMINISTRATORS.
INVESTMENT.
See EXECUTORS and ADMINISTRATORS.
ISSUE, DIE WITHOUT.
See DESCENTS.
JUDGMENT CREDITORS.
Bound by vendor's lien..... 223
Not a bona fide purchaser..... 129
Rights as against mortgagee..... 247
JUDGMENT LIENS.
Not a lien on real estate by statute..... 280
Against husband do not bind property held by entireties..... 280
Interlocutory judgment by default not a lien..... 280
Lien dates from final judgment..... 280
Judgments of Justice of the Peace..... 280
Nature of..... 280
Property of debtor subject to..... 281
Duration of lien..... 281
Extent of lien..... 281
How made lien in other jurisdictions..... 282
Of Court of Appeals..... 282
Federal Courts of Maryland..... 282
Decrees of Equity Court for payment of money..... 282

JUDGMENTS.
Binding on parties and their privies..... 174
Confer title by way of estoppel..... 174
Enforcement of lien of..... 144
Of Justice of Peace—
Execution against land on..... 147
Priority of mortgage lien..... 247
Void for irregular summons..... 146

JURISDICTION.
In execution sales.....145-146
Sales under decrees..... 151

JUSTICE OF THE PEACE.
See JUDGMENT LIENS.
Acknowledgments taken by.....111-114
Lien of judgments of..... 280

LANDLORD AND TENANT.
See TENANTS OR LESSEES.

LAND OFFICE.
Land grants through..... 4

LAND TITLES.
History in Maryland..... 3
How individual may acquire from State..... 4
Mode of investiture in State..... 3

LAND UNDER WATER.
See WATER.

LAPSE OF DEVISE OR LEGACY.
See DEVISE.

LEASE AND RELEASE.
As a mode of conveyance of a freehold..... 54-53

LEASEHOLD PROPERTY.
See VENDOR'S LIEN.
Deeds or leases creating or assigning—requirements as to recording 132
Passes to legatee through administrator or executor..... 140
Perpetual owner acquires right to extensions below high water mark 183
Sales of, ratification by Orphans' Court..... 141

LEASES AND GROUND RENTS.
See CONVEYANCES; DEEDS.
Covenants—
Running with the land.....100-101
Examples 101
Liability of assignee of leasehold interest..... 101
Remedies of lessor for breach of..... 101
Right to redeem land..... 101
Right of lessee to purchase..... 101
Right to renewal of term..... 102
Quiet enjoyment..... 101
To insure..... 101
To repair..... 101
To pay rent..... 101
Personal covenants.....100, 102, 103
Illustrations 102
When enforced as a real covenant..... 103
Of mortgaged premises.....238-240
Rights of purchaser of mortgaged premises against lessee..... 240
Sub-lessor estopped to claim greater rent of sub-lessee, when.. 176

LEGAL TITLE.
See MORTGAGES.

LEGISLATURE.
Eminent domain, power inherent in..... 212
Grants by..... 78

LESSEES.
See TENANTS OF LESSEES.

LIEN CLAIMANTS.
See TITLES OF VARIOUS LIENS.

LIENS.
See JUDGMENTS; JUDGMENT LIENS; MECHANICS' LIENS; MORTGAGES; VENDOR'S LIENS.
Attachment and execution liens.....282-283
Bail bond or recognizance in Baltimore City..... 285
When becomes a lien..... 286
Effect of forfeiture..... 286
Collateral Inheritance Tax..... 284
Estates and property subject to.....284-285
Common law definition..... 221
Affects personal property only..... 221

LIENS—Continued.
Decedents debts—nature and effect of..... 284
How disclosed..... 284
Personal property subject to..... 284
Equitable liens..... 221
Of mortgagee on rents of premises..... 239
Of statutory preferred stock of corporation..... 285
Property of corporation affected by..... 285
Owelty of partition, lien for..... 279
Purchase money mortgage.....253-254
Statutory liens..... 221
Enumerated 221
Taxes and assessments..... 283
Street charges..... 283
LIMITATIONS.
See ABANDONMENT; ADVERSE POSSESSION; DEDICATION.
Abandonment of easement effected by..... 186
Adversary possession for 20 years ripens title..... 165
Leasehold acquired by..... 166
Converts leasehold into fee..... 165
Running of statue..... 167
Mortgage lien extinguished by..... 278
Persons under disability.....168-171
Infants 168-171
Femes Covert.....168-170
Lunatics 168-171
Prisoners 168-170
Persons beyond the seas.....168-170
Statutes apply to easements.....172-173
Title quieted by..... 2
LIS PENDENS.
Doctrine of..... 287
Proceedings to which applied..... 287
What constitutes..... 287
What is notice of..... 288
Relates directly to thing or property in question..... 288
Suits to recover debts due State..... 288
Proceedings for partition of land lying in two counties, etc.; when constructive notice presumed..... 288
LIVERY OF SEIZIN.
See CONVEYANCES.

LOANS.
See MORTGAGES.
Future, mortgage to secure..... 250
LUNATICS.
See CONVEYANCES; DEEDS.
Deeds by or to.....61-63
Lunacy—
When a bar to title by adverse possession.....168, 170
Proceedings affecting real estate or property of.....148-151
Lunacy proceedings..... 148
MALE HEIRS.
See HEIRS.
MARK.
Deeds signed by..... 104
MARRIED WOMEN.
See CONVEYANCES; DEEDS; ENTIRETIES; JUDGMENT LIENS.
Acknowledgments by..... 111
Deeds of—
As parties to deeds.....63-66
Curative acts, effect of..... 64
Infancy, effect of.....64-65
Limitations 64
Mode of determining validity of..... 64
Power to make rests on statutes..... 64
Powers to make under Common Law..... 64
Statutes relating to.....64-65
When under 18.....64-65
Wife's sole and separate estate.....64-65
Sole and separate estate of.....64-65
Conveyances, common law powers..... 64
Statutory powers..... 65
Power to convey property under common law..... 64
Powers of attorney from..... 123
Statutes relating to..... 123
Title to property of by adverse possession.....168-170
MECHANICS LIENS.
Of statutory origin..... 279
MERGER OF ESTATES.
Effected by lease and release..... 55
MISNOMER.
See DEEDS.

MISREPRESENTATION.
Estoppel by..... 178
MISTAKE.
See DEEDS.
MODERN CONVEYANCES.
See CONVEYANCES; DEEDS.
MORE OR LESS.
Meaning in deeds, etc..... 86
See MORTGAGES.
MORTGAGE NOTES.
See MORTGAGES.
MORTGAGES.
See CONVEYANCES; DEEDS; DEEDS OF TRUST; LIENS; AND TITLES OF VARIOUS LIENS.
Acknowledgment of..... 243
Affidavit as to consideration named in..... 243
By whom it may be made.....243-244
Effect of absence on mortgage.....244-245
Who may make..... 243
Affidavit of mortgagee as to taxes on interest..... 245
Counties in which required..... 245
Assignee of—
Title acquired by..... 255
Not bound to pay mortgage debt..... 255
Assignment of.....260-270
Attestation not essential..... 245
By implication.....261-266
By assignment of mortgage debt..... 261
By indorsement or assignment of notes..... 261
Conflict in priorities of claimant holders of notes..262-263
Assignee of part of debt entitled to foreclose..... 264
Unjust consequences of doctrine..... 264
Remedy provided by Act 1892 ch. 392.....264-265
Record holder after maturity of notes presumed to be owner thereof..... 265
By Act 1910, ch. 719, record holder of title to mortgage presumed to be owner of notes before and after maturity..... 265
Long and short forms of..... 260
Requisites of.....260-261

MORTGAGES—Continued.
Mode valid in Baltimore City in foreclosure under an assent to decree..... 261
Rights of assignee as against mortgagor and his assigns... 265
Mortgagor not prejudiced by.....265-266
Cases illustrating..... 266
Effect as between assignee and creditors of mortgagor where mortgage is voidable for fraud..... 266
Attestation not essential.....107, 245
Attitude of equity in dealing with.....232-233
Common law view of..... 230
Consideration, affidavit as to.....243-245
Effect where not bona fide.....244-245
Conveyance of property subject to.....255-256
Covenant of special warranty in such deed, effect..... 255
What is necessary to bind transferee to pay debt..... 256
Acceptance of deed with covenant to pay debt..... 256
Relations between mortgagee, mortgagor and grantee 256
When mortgagor may be discharged from liability.... 256
Acts of mortgagee which will not discharge mortgagor 256
Where mortgage is usurious..... 256
Which grantee agreed to pay..... 257
Covenant to pay mortgage debt..... 102
Creditors of mortgagor—effect of recording on rights of..... 135
Decree necessary when recorded after six months..... 135
Equity of Redemption—
Conveyance of to mortgagee..... 232
When mortgagor may redeem..... 233
Equitable Mortgages—
Against whom enforceable..... 273
Agreement to execute a mortgage..... 272
Case illustrating doctrine of priorities..... 274
Deed absolute on its face but intended as a mortgage..... 272
Defectively executed legal mortgage..... 271
Deposit of title deeds..... 273
Existing creditors of mortgagor bound..... 274
Including claims reduced to judgment..... 274
Four forms of..... 271
Third persons not bound..... 274
When given priority over judgment..... 145

MORTGAGES—Continued.
Foreclosure of mortgage....148, 232-237
Bond, notice by advertisement and report of sale.... 235
Decree *in personam* against mortgagor.... 235
In Baltimore City—
Consent to a decree for sale.... 237
Decree for sale—proceedings for....236-237
Decree *in personam* in case of deficit.... 237
Power of sale—
Who may exercise.... 235
Who may not.... 235
Exercise where corporation holds mortgage.... 236
Assignee, rights of.... 236
Passes with assignments of mortgage.... 236
Proceedings in sale under power.... 235
Strict foreclosure.... 233
Now abandoned.... 234
Present practice.... 234
Power of sale by mortgagee or attorney named in mortgage.... 234
Form of mortgage....242-246
Granting and defeasance clause essential.... 242
Recording of defeasance essential.... 242
Effect of failure to record.... 243
Growing crops—assignment of by mortgagor.... 238
History of.... 229
Instruments not technical mortgages.... 247
Interest, affidavit of mortgagee as to taxes on.... 245
Counties in which required.... 245
Is in equity security for a debt.... 231
Investment of proceeds....148-151
Liability of assignee upon covenants running with land.... 101
Lien extinguished by running of limitations.... 278
Mortgagor—
Covenant of possession by.... 230
Rights at law before default.... 230
May maintain ejectment.... 230
His equity of redemption.... 230
Right to redeem cannot be surrendered.... 231
Substantial owner before default.... 238
Rights as against mortgagee....238-239
May maintain actions for injuries to property.... 238

MORTGAGES—Continued.
May assign his interest 255
Interest of descends to his heirs or if leasehold passes to his personal representatives 255
If it descends to heirs administrator may be called on to pay off mortgage 255
Title acquired by assignee of interest of 255
Void agreements restricting 232-233
Mortgagee—
When considered owner 238
Not bound by acts of mortgagor 238
Judgment not a lien against his interest 239
When entitled to rents and profits 239-241
Nature of his interest 239
May assign his interest 255
Rights against assignee of mortgagor 239
Against receiver of mortgaged premises 240
Persons paying debt subrogated to rights of 267
Persons entitled to subrogation 267
Subrogation of mortgagor 267
When invoked in favor of one paying at request of mortgagor 267
Cases illustrating doctrine 268-270
Doctrine does not apply if intervening equities exist .. 269
Nor against superior or equal equities 269
Conflict among lien claimants 270
Surrender of leasehold by mortgagor thereof, effect 240
Rights and duties when in possession after default 241
Obligations of his possession 241
Repairs 241
Allowance for expenditures 241
Rents and profits 241
Must be signed, sealed, acknowledged and recorded 245
Notes, mortgage given to secure payment of 244
Not recorded within six months 130
Property which may be mortgaged 253
After acquired property 253
Rule as to chattels 253
Lien as to such property 253
Provisions of code as to railroad corporations 253
Provisions usually contained in 251
Recitals 251
Time of payment 251

MORTGAGES—Continued.
Evidences of debt..... 251
Covenants—
To pay debt and interest..... 252
To pay taxes, public dues and charges..... 252
To keep premises insured..... 253
Purchase money mortgages.....253-254
Priority of lien of..... 254
Provisions of code limited in application..... 254
Lien extended in favor of third party, when..... 254
Vendee only acquires the equity of redemption..... 254
Purchasers of mortgaged premises under foreclosure..... 240
Rights as against tenants..... 240
Recital in deed mentioning does not bind grantee to pay debt.. 235
Recording of..... 243
Must be recorded within six months..... 132
Statutory requirements.....246-247
Failure to record..... 246
Priorities of lien claimants, creditor's rights..... 247
Recorded within six months—when effective..... 130
Recorded after six months—decree authorizing necessary 129-130-136
Redemption satisfaction and payment of mortgages.....276-278
Who may redeem..... 276
Amount to be tendered..... 276
Effect of tender and refusal to receive it.....276-277
Requirements of a valid tender..... 276
Formal release unnecessary..... 277
Three modes of releasing mortgage..... 277
Long or formal release..... 277
Short release..... 277
Entry of on record..... 277
By entry in foreclosure case..... 278
Notes, when production necessary to effect release..... 278
Release of, attestation not essential..... 245
Right to redeem..... 231
Sales under powers in mortgage.....234-236
Seal of mortgagor, requirements for..... 245
Substitution or subrogation to rights of mortgagee.....266-270
Tacking of mortgages.....258-260
English doctrine..... 258
In whose favor invoked..... 259

MORTGAGES—Continued.
Consolidation of mortgages..... 259
Not the law in this country..... 259
How modified form of doctrine may exist in Maryland... 260
View of in equity..... 239
Vivum vadium and mortuum vadium..... 229
What may be secured by.....250-253
Indemnity mortgages..... 250
To secure debts..... 250
Future loans or advances..... 250
Statutory requirements..... 250
Loans not named in mortgage..... 251
Witnessing of mortgagor's signature..... 245
Not necessary in Maryland..... 246

MORTGAGOR.
See MORTGAGES.

MORTGAGE TAX.
See MORTGAGES.

MOTHER.
See DESCENTS; ILLEGITIMATE CHILDREN.
Estates descending on part of.....18-25

MOTION TO QUASH.
Effect in execution sales..... 146

MUNICIPAL CORPORATIONS.
Eminent domain; exercise of powers by..... 220
Grantee of dedicated land or easement..... 188
Mere dedication of highway to public imposes no liability upon 201-202
Nor does unauthorized acceptance..... 203
Proceedings by to enforce public rights acquired by dedication 204-205

NAMES.
See DEEDS.
Misnomer and omission in deeds.....66-69

NAVIGABLE WATER.
Rights of owners of lots on.....181-183
Title to land under..... 88

NON COMPOS MENTIS.
See LUNATICS.
Sale or partition of real estate of.....148-151

NON RESIDENTS.
See ADVERSE POSSESSION; DECREES; LIMITATIONS; PARTIES; SALES.
As parties in equity proceedings..... 150
Proceedings relating to 148-157
NON USER.
As creating presumption of abandonment of an easement...184-186
NOTARY PUBLIC.
Acknowledgments taken by.....111-114
NOTES.
See MORTGAGES; VENDOR'S LIEN.
NOTICE.
See ADVERSE POSSESSION; CONSIDERATION; DEEDS; JUDGMENT LIENS; LIENS; LIS PENDENS; MORTGAGES; RECORDING OF REGISTRATION; VENDOR'S LIEN.
Of title—
Constructive notice by public records.....131-137
Possession of land as.....137-139
Recorded defective deed not constructive notice..... 133
NUISANCE.
In highway—no prescriptive right to maintain..... 201
OCCUPANCY.
Title by..... 206
ORPHANS' COURTS.
See EXECUTORS and ADMINISTRATORS.
Acknowledgments taken by Judge of.....111-112
Real estate of decedent.....142-143
Concurrent jurisdiction with equity—when..... 142
Test of jurisdiction..... 143
Proceedings in such cases..... 143
Trustee to make sale..... 143
Court must ratify sales by executors under wills..... 143
Sales—
Courts power to direct sale..... 141
Curative act..... 141
Ratification of sales by.....140-143
OWELTY OF PARTITION.
Lien for on joint property..... 279
OWNER.
Of mortgaged premises..... 238

PAROLE GIFTS OF LAND.
Effect of Statute of Frauds upon..... 41
PATENTS.
See PURCHASE, TITLE BY.
Lands not patentable..... 39
Title from State by..... 4
To government lands.....38-39
Federal grants..... 38
State grants..... 39
PARTICULAR ESTATE.
See REVERSION; REMAINDERS.
PARKS, SQUARES AND COMMONS.
Dedication of land for..... 189
Dedication of to public—(See "Dedication").
PARTIES.
See DECREES; DEEDS; HEIRS; NON RESIDENTS; SALES.
Bound by decree of sale..... 150
To Deeds—(See "Married Women").
Misnomer of.....66-69
PARTITION SUITS.
See INFANTS; LUNATICS.
Procedure 148-151
When constructive notice of *lis pendens*..... 287
PARTNERSHIP ESTATES.
Partners may be grantees under firm name..... 68
PERSONAL COVENANTS.
See COVENANTS; DEEDS; LEASES.
PERSONAL PROPERTY.
See EXECUTORS and ADMINISTRATORS; ORPHANS' COURTS.
Devolution of title to..... 8
In Maryland..... 13
Decedent's debts a lien upon..... 284
Mortgage of..... 253
PERSONS BEYOND THE SEAS.
Title to property of by adverse possession.....168-171
PLATS.
See DEDICATION.
Effect in determining dedication.....195, 196, 197
Effect on title to highways..... 91

POLES AND WIRES.
On public street additional servitude..... 220
POLL (DEEDS POLL).
See DEEDS.
PORT WARDEN'S LINE.
Limits improvements of reparian owners..... 183
POSSESSION.
See ADVERSE POSSESSION; DEEDS; MORTGAGES; RECORDING and REGISTRATION.
As an element of title to land..... 2, 3
As notice of title—(See "Notice").
Of land by third parties; notice to purchaser..... 138
Possession of land as notice of title.....137-139
Purchaser put on inquiry..... 137
Application of doctrine..... 137
Same effect as recording of deed..... 137
Nature of possession required..... 138
—illustration 138
Does not prevail over tenant's record title..... 138
Grantor's continued possession not to affect title from him to grantee..... 139
Presumption of notice of rights arising therefrom..... 139
POWER OF ATTORNEY.
See DEEDS.
To make and execute deeds.....122-124
Execution of deed by attorney.....123-124
Common law method..... 123
Statutory method..... 124
Effect of recording..... 122
Exercise of in subsequent transactions..... 122
Of married women at common law..... 123
Enlargement of her powers by statute..... 123
Power coupled with an interest..... 122
Revocation of 122-123
Statutory requirements 122
Sale or conveyance of realty—recording..... 132
POWERS.
See DEVISE; EMINENT DOMAIN; MORTGAGES; WILLS.
Mortgage foreclosure.....234-236
Of sale—(See "Executors and Administrators" and "Mortgages").
Vendor's lien may contain..... 225

PREFERRED STOCK.
See CORPORATIONS.
PRESCRIPTION.
See ADVERSE POSSESSION; LIMITATIONS.
Easements acquired by..... 172
Statutes of limitations apply to..... 172
Rights of way acquired by..... 172
Burden of proof to establish rights acquired by..... 172
Presumption as to grant..... 172
Public highway..... 173
Road or street acquired by public by.....203-204
PRESUMPTIONS.
See ADVERSE POSSESSION; DEEDS; DEATH; INSOLVENCY; POSSESSION; WILLS.
As to grants of easements..... 172
Of notice of rights from possession of land..... 139
PRIMOGENITURE.
See DESCENTS.
PRIORITIES.
See JUDGMENT LIENS; LIENS; MORTGAGES; RECORDING and REGISTRATION; VENDOR'S LIEN.
In deeds of trust..... 249
Of lien claimants—(See "Mortgages").
PRISON, PERSONS IN.
See LIMITATIONS.
Title to property of by adverse possession.....168-171
PRIVATE CORPORATIONS.
See CORPORATIONS; EMINENT DOMAIN.
PRIVATE EASEMENT.
See ADVERSE POSSESSION; DEDICATION; EASEMENTS.
PRIVATE RIGHT OF WAY.
See DEDICATION; EASEMENTS.
PRIVITY OF ESTATE.
See LEASES; MORTGAGES.
PROCESS.
By publication against non residents..... 150
Decress not binding without..... 149
Essential to bind judgment debtor in sales under execution... 146
Requisite to estoppel by record.....149-175
Requisite to bind party under doctrine of *lis pendens*..... 288

PROFITS AND RENTS.
Of mortgaged premises....238-239-240
PROPERTY.
Which may be mortgaged.... 253
PUBLICATION, PROCESS BY.
See PROCESS.
PUBLIC DUES AND CHARGES.
Covenant in mortgage to pay.... 252
PUBLIC EASEMENTS.
See EASEMENTS; PUBLIC HIGHWAYS.
PUBLIC HIGHWAY.
See ADVERSE POSSESSION; DEDICATION; EMINENT DOMAIN; PRESCRIPTION.
Acquisition of by prescription.... 173
Creation by estoppel *in pais*.... 179
Abandonment of by public acts *in pais*.... 180
Lost to public by non user.... 186
No rights acquired in by adverse possession.... 170
PUBLIC SERVICE CORPORATIONS.
Eminent domain—exercise of powers by.... 220
PUBLIC USES OR PURPOSES.
See EMINENT DOMAIN.
PURCHASE, TITLE BY.
See CONVEYANCES; PATENTS.
Defined.... 5
Differentiated from title by descent.... 5
Escheat lands, title to.... 39
Grant from state, title by....38-39
Grants from Federal Government.... 38
Modes of acquisition.... 5
Patents from state.... 39
Mode of patenting vacant or escheat lands.... 39
Effect in passing title.... 39
Private grants—title by.... 40
Rule applicable to devises.... 6-7
PURCHASE MONEY.
Vendor's lien for sale unpaid.... 223
PURCHASE MONEY MORTGAGES.
See MORTGAGES.

PURCHASERS FOR VALUE.
See CONSIDERATION; DEEDS; MORTGAGES; RECORDING OF REGISTRATION.
Acknowldgments, status as to....113-115
May attribute possession of 3rd party to his record title..... 138
QUASI PARTIES.
See SALES.
QUIET ENJOYMENT.
Covenant for..... 101
QUIETING TITLE.
Statutory provisions for..... 2
QUIT CLAIM DEEDS.
See DEEDS.
RAILROADS.
See EMINENT DOMAIN.
Change of route by not *per se* abandonment of old route..... 186
Mortgage of property of..... 253
No dedication of land to..... 192
RATIFICATION.
Of Sales—See "Executors and Administrators"; "Mortgages"; "Orphans' Courts"; "Sales."
Of tax sales..... 153
REAL COVENANTS.
See DEEDS; LEASES.
REAL ESTATE.
See VENDOR'S LIEN.
Passes directly to devisee..... 140
Sales—Ratification by Orphans' Court..... 141
Title to defined..... 2
RECEIVERS.
Dedication of land by..... 191
Of mortgaged premises, rights of mortgagee against..... 240
RECITALS IN DEEDS OR MORTGAGES.
See ESTOPPEL.
Effect of.....251-255
RECOGNIZANCE.
Lien in Baltimore City..... 285
RECORD.
Estoppel by—(See "Estoppel").

RECORDS OF CONVEYANCES, ETC.
Provisions relating to counties and Baltimore City..... 127

RECORDING OR REGISTRATION OF DEEDS, ETC.
In general—
Not general in England..... 125
Rule as to title rank where no system of..... 125
Maryland system..... 125
Statutory history..... 125
Object of..... 126
When essential to pass title..... 126
Attestation does not affect..... 133
Clerks of courts, duties..... 127
To keep record books and indexes..... 127
Books and indexes required..... 127
Mode and requirements for recording..... 127
Constructive notice, doctrine of.....131-132
Relates only to papers required to be recorded..... 131
Classes of instruments required to be recorded..... 132
Instrument must be otherwise in proper legal form..... 133
Date deed becomes effective.....126-127
Defective deed not constructive notice..... 133
Delivery presumed from..... 118
Enrollment, legal effect of..... 133
Evidence—certified copies of record are..... 134
But instrument must be valid otherwise..... 134
Instrument first recorded prevails..... 128
Rule relates to *bona fide* purchasers..... 128
Does not apply to assignee for benefit of creditors..... 128
Nor in cases amounting to fraud..... 128
Nor to judgment creditors..... 129
Not conclusive of validity of instrument..... 133
Of mortgage—(See "Mortgages").
Place of..... 126
Possession of clerk is possession of grantee..... 118
Powers of attorney..... 122
Probative effect of..... 133
Recorded within 6 months' period—
Effective from date of deed..... 130
If deed is otherwise valid..... 130
But not as against a *bona fide* purchaser..... 131
Though good against a judgment creditor..... 131

RECORDING OR REGISTRATION OF DEEDS—Continued.
Recorded after 6 months' period.
Creditors who are bound 135-136
Creditors who are not bound..... 135
Deeds of trust are valid..... 130
Does it relate back to its date?..... 131
Effect and validity of.....134-135
Embraces deeds not otherwise invalid only..... 130
General rule.....129-134
Lien creditors, rights of..... 135
Mortgage acquires no validity thereby..... 130
Mortgages, decree necessary..... 136
Mortgages, effect as to creditors..... 135
Persons bound by..... 129
Recorded deed as evidence..... 133
Grounds for setting it aside..... 133
Time limit for..... 126
Title does not pass until.....126-127
RECOVERIES.
See CONVEYANCES.
REDEMPTION OF MORTGAGES.
See MORTGAGES.
RE-ENTRY.
See ADVERSE POSSESSION; LEASES; MORTGAGES.
RELATIONSHIP.
See DESCENTS.
RELEASES.
See CONVEYANCES; MORTGAGES; VENDOR'S LIEN.
Of mortgage, its effect..... 101
Attestation of 245
Not essential..... 107
RELIGIOUS CORPORATIONS.
See CORPORATIONS.
REMAINDERS.
Conveyance of to owner of particular estate.....44-45
RENEWAL OF LEASE.
Covenant for—(See "Leases").
RENT.
Covenant to pay..... 101
RENTS AND PROFITS.
Of mortgaged premises.....238-240

REPAIRS.
By mortgagee in possession..... 241
Covenant to make in leases..... 101
REPORT OF SALES.
See SALES; ORPHANS' COURTS.
Tax Sales..... 153
REPRESENTATION, DOCTRINE OF.
See DESCENT.
Among descendants..... 18
Among collaterals.....22-25
Doctrine discussed..... 24-25
Purchase, estates by..... 27
REPRESENTATIVE PARTIES.
See SALES.
REPUGNANT CLAUSES.
See DEEDS.
RESERVATIONS.
See EASEMENTS.
RESTRICTIONS.
See COVENANTS; EASEMENTS.
REVERTER.
See LIMITATIONS.
REVOCATION.
See DEDICATION; POWER OF ATTORNEY.
RIGHTS OF WAY.
See DEDICATION.
Extinguished by tax sale..... 156
Prescription, acquisition by..... 172
RIPARIAN OWNER.
See ACCRETION.
Rights in improvements and additions below high water....181-183
RIPARIAN RIGHTS.
See ACCRETION; DEEDS.
ROADS.
See DEDICATION; EMINENT DOMAIN.
Condemnation proceedings realting to..... 215
Grants of land binding on..... 89-91
SALES.
See EXECUTORS and ADMINISTRATORS; ORPHANS' COURTS; TAX TITLES; VENDOR'S LIEN; WILLS.
By executors or administrators.....141-143

SALES—Continued.
Execution Sales—
How made 144
Title derived from 144
Of equitable interests 144
Of property held by entireties 144
Encumbrances not affected by 144-145
Purchaser acquires only title of judgment debtor 144-145
Requirements to vest good title in 145-147
Jurisdictional requirements 145
Court must have jurisdiction of subject matter and parties 145-147
Seizure of land indispensable 145
Levy 146
Summons 146
Summons by two non ests 146
Sales void on judgments by 146
Law favors sheriff's sales 146
Motion to quash writ 146
Its effect 146
Executions on magistrate's judgments 147
Mortgage foreclosure proceedings 234-237
Tax sales—
Attitude of court toward 154
Bars all private titles and encumbrances 152
So also with easements 152
Burden of proof of regularity 152-153
Rule at common law 152
Statutory changes 153
Reforms in other States 156
Report of sale to court 153
Ratification nisi 153
Effect of ratification 153
Object of ratification 153
Sale void because—
Defect in advertising 154-155
Collector making sale did not execute deed 154
Report of sale defective 155
Notice—death of person previous to 156
When valid or voidable 134

SALES—Continued.
Under Decrees—
Actual parties—who must be..... 149
Constructive parties..... 150
Court must have jurisdiction over subject matter.....149-150
And over parties to suit.....149-150
Doctrine of caveat emptor applies..... 150
Failure of jurisdiction..... 151
When decree void..... 151
When voidable..... 151
Rights of third parties to attack decree..... 151
Interests passed by decree..... 150
Interests of person not party not bound..... 150
Jurisdictional averments..... 149
Mere irregularities or defects of form..... 151
Non-residents as parties..... 150
Principal cases where court may decree sale.....148-149
Quasi parties or parties by representation..... 150
Sale or decree cannot be attacked collaterally..... 151
Statutory requirements must be followed..... 149
Title passed by decree.....150 151
Reversal of decree on appeal..... 151
SATISFACTION OF MORTGAGE.
See MORTGAGES.
SCHOOLS.
Dedication of land for..... 189
"SEA-BEACH."
Meaning in conveyancing..... 89
SEALING OF DEEDS.
See DEEDS.
SEALS.
See DEEDS.
Of mortgagor..... 245
To deeds.....104-106
SECURITY.
Mortgage given as..... 250
SEIZIN.
See CONVEYANCES.
Covenant of grantor..... 98
SERVITUDE.
See EMINENT DOMAIN.

SETTLEMENTS.
See ADVANCEMENT and HOTCHPOT.
SEX.
As affecting title—(See Descent).
SEWERS.
Dedication of..... 189
SHERIFFS' SALES.
See SALES.
Law favors..... 146
"SHORE."
Meaning in conveyancing..... 89
SIGNING OF DEEDS.
See DEEDS.
SIGNATURES TO DEEDS.
See DEEDS.
SILENCE—Estoppel by..... 179
SOLE AND SEPARATE ESTATES.
See MARRIED WOMEN.
SPECIAL WARRANTY.
Covenant of..... 97
Effect upon after acquired title..... 177
SPECIFIC PERFORMANCE.
See VENDOR'S LIEN.
For enforcement of covenant for further assurance..... 99
STATEMENTS IN DEEDS.
See ESTOPPEL.
STATUTES.
See TITLES OF VARIOUS SUBJECTS AFFECTED.
Relating to married women.....64-65
STATE OF MARYLAND.
See EMINENT DOMAIN; ESCHEAT; PATENTS.
Acknowledgments without State,—proper officers to take..... 112
Doctrine of *lis pendens* relates to..... 287
Limitations do not run against..... 170
Title to land from..... 4
STATUTE OF FRAUDS.
See CONVEYANCES; DEEDS; LEASES.
STATUTE OF LIMITATIONS.
See ADVERSE POSSESSION; LIMITATIONS; PRESCRIPTION.

STATUTE OF USES.
See CONVEYANCES.
Construction of deeds operating under..... 57
STATUTE TO DIRECT DESCENTS.
See DESCENTS.
STATUTORY DEDICATION.
See DEDICATION.
Title by..... 187
SATUTORY SEPARATE ESTATE.
Of married woman, power to convey.....64-65
STAY OF EXECUTION.
Effect of on judgment lien..... 281
STREETS.
See DEDICATION and EMINENT DOMAIN.
Dedication of land for—(See "Dedication").
Grants of land binding on.....89-91
Opening, widening, straightening and closing—condemnation proceedings for..... 215
SUB-LEASE.
See LEASES.
SUBROGATION.
See MORTGAGES; sub-title MORTGAGEE; VENDOR'S LIEN.
SUBSTITUTION.
Of person paying mortgage debt.....266-270
SUICIDES.
No forfeiture of estates of..... 207
Common law rule..... 207
SUMMONS.
See SALES.
Of mortgagor upon deficit under foreclosure..... 235
SUPERSEDEAS.
Effect on lien of judgment..... 282
SUPREME BENCH.
Acknowledgment taken by judge of..... 111
SURNAMES.
See NAMES.
SURRENDER.
See CONVEYANCES, DEEDS, LEASES.

TACKING OF MORTGAGES.
Doctrine of—(See "Mortgages").

TAXES AND ASSESSMENTS.
Liens for.....283-284
Covenant in mortgage to pay..... 252
On mortgage interest and debt..... 245
Payment as evidence of adverse possession.....159-160

TAX SALES.
See SALES.

TAX TITLES.
See SALES.
Title derived from tax sale..... 152

TENANTS IN COMMON.
Cannot dedicate the common property..... 191

TENANTS OR LESSEES.
Cannot dedicate land to bind landlord, when..... 191
Of mortgaged premises, rights as against purchasers at foreclosure sale..... 240

TENDER.
Legal tender of mortgage debt.....276-277

TERRITORIES OF UNITED STATES.
Acknowledgment to deeds in..... 112

THIRD PARTIES.
See DEEDS.

TIDE WATER.
Improvements and accretions to land on..... 183

TITLE.
See VARIOUS SUBDIVISIONS OF THE SUBJECT.
By Devise—(See "Devise.")
Definitions 2
Elements of a perfect..... 2

TITLE DEEDS.
Deposit of creating equitable mortgage..... 273
Recording or registration.....125-129

TRANSFEREE.
Of mortgaged premises, when bound to pay debt.....255-256

TRANSFERS OF PROPERTY.
See DEEDS; RECORDING OF REGISTRATION.

TRUSTEES.
Dedication of land by..... 190
Devolution of naked legal title of..... 15
Death of, common law heirs necessary parties in suits affecting trust property..... 15
Grants to..... 77
Mortgage foreclosure proceedings..... 236
TRUSTS.
Deeds creating..... 82
UNDUE INFLUENCE.
See DEEDS.
UNITED STATES.
Acknowledgments without—proper officers to take..... 113
Limitations do not run against..... 170
UNITED STATES COURTS.
Acknowledgments taken by judges of.....112-113
UNITED STATES GOVERNMENT.
Grants of land by..... 38
UNKNOWN HEIRS.
Of deceased persons, proceedings relating to.....148-151
USE.
See CONVEYANCES; STATUTE OF USES.
Declaration or limitation of,—deed containing must be recorded 132
USURY.
As defense of mortgagor or transferee.....256-257
VENDEE.
See VENDOR'S LIEN.
Interest acquired from mortgagor..... 255
Lien in favor of,—when it arises..... 228
VENDOR'S LIEN.
Amount recoverable thereunder..... 225
Recovery by assumpsit..... 225
Assignment of lien..... 227
Modes of..... 227
When lien extinguished by, notwithstanding Act 1910, ch. 216..... 227
Bond of conveyance a form of..... 225
Collateral or other security—effect of acceptance on..... 226
Effect of Act 1910, ch. 216..... 226
Proper and improper liens now on same footing..... 226

VENDOR'S LIEN—Continued.
Enforcement of lien, procedure..... 225
Foreclosure and sale,—jurisdiction of equity..... 148-151
Equity recognizes and will enforce it..... 223
Extinguished by assignment without recourse..... 227
May contain power of sale..... 225
Mode of executing power..... 225
Must be expressly reserved..... 226
Notes for purchase money payable out of sales—Effect of sales. 228
Persons whose claims are subordinate to..... 223
Procedure in equity to foreclose.....148-151
Release, modes of..... 227
Effect of when recorded..... 228
Sale under equity procedure.....148-151
Subrogation of surety paying debt..... 228
Requisites therefor..... 228
Vendor may sell chattels on default..... 225
But not real and leasehold property..... 225
Vendor's lien proper 225
Vendor's lien improper 225
When lien arises..... 223
VOID AND VOIDABLE DEEDS.
See DEEDS.
VOLUNTEERS.
Bound by vendor's lien..... 223
VOLUNTARY CONVEYANCES.
See CONSIDERATION; CONVEYANCES; DEEDS.
WARRANTY OF TITLE.
See CONVEYANCES; DEEDS.
Effect on after acquired title..... 177
Effect of special warranty..... 177
WATER.
Land under cannot be acquired by adverse possession..... 160
WATER FRONT.
Improvement of by owners; title by accretion.....181-183
Water-front lots,—who are proprietors of..... 183
WATER RIGHTS.
Condemnation of.....218-219
WHARVES (PUBLIC).
Dedication of land for..... 189

WIFE.
See HUSBAND and WIFE; ENTIRETIES; MARRIED WOMEN.
Estate of inheritance descends subject to rights of..... 8
WILLS.
See DEVISE; EXECUTORS and ADMINISTRATORS; ORPHANS' COURTS; PURCHASE TITLE BY; SALES.
No presumption of disinheritance of heir..... 9
Omission of name of heir, effect..... 9
Rule in determining kind of title acquired by..... 6
Sales under powers in..... 141
WITNESSES.
See CONVEYANCES; DEEDS; MORTGAGES.
To signature of mortgagor.....245-246
WRONGDOERS.
No forfeiture of estates of..... 207

DL AFT UEt
Title to real and leasehold es
Stanford Law Library
3 6105 044 263 171